QUARTERLY REPORT

of the

ATTORNEY GENERAL

of

ALABAMA

For the Period:
From October 1, 1939
Through December 31, 1939
Volume XVII

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act No. 50 House Bill 225 approved February 21, 1939, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from October 1, 1939 through December 31, 1939.

The Act referred to above requires that seven copies of this Quarterly report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Act also provides a copy of said report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in this State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestion to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
THOMAS S. LAWSON,
Attorney General.

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OPINIONS

October 1, 1939.

Hon. S. D. Bayer,
Superintendent of Education,
Greene County,
Eutaw, Alabama.

Schools—County Board of Education—

In compliance with the provisions of Section 123 of the Alabama School Code of 1927, the statement which the County Board of Education is required to publish annually in a newspaper at the county seat must contain a full and complete itemized statement of all disbursements made by the County Board of Education during the year covered by such statement, i. e., the name of the person to whom payment was made, the amount of the payment, and the purpose for which the same was made.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of September 8, 1939, in which you request my opinion as follows:

"In publishing my annual report of school finances in the past I have listed the amount each person received, i. e., each white teacher, each negro teacher, each bus driver, and each firm, corporation or person who received payment for goods, material, supplies, labor or other services—which payments had been placed on the calendar payroll sheets. This report, of course, covers quite a bit of space in the local newspaper.

"It has come to my attention that the plan followed in other counties is about as follows: instead of listing each individual teacher and person and stating the amount each received, the expenses are grouped; as total for elementary white teachers, total for high school white teachers, total for bus or transportation, total supplies and total general expenses etc. This procedure of course makes a very much shorter report.

"I am asking if you will kindly give me your opinion as to which method, if either, is correct as required by law.

"This has reference to disbursements and not to receipts."

I presume that you have reference to the statement which the County Board of Education is required to publish annually in a newspaper at the county seat of the county by Section 123 of the Alabama School Code of 1927, which reads in pertinent part as follows:

"123. ANNUAL REPORT PUBLISHED.—The County Board of Education shall publish annually in the County newspaper at the County Seat of each County **a full and complete itemized statement of the receipts and disbursements of the** County at the same time it forwards same to the State Superintendent of Education." (Emphasis supplied);

which you are required to prepare in accordance with the direction of the County Board of Education by the provisions of Section 165 of the Alabama School Code of 1927.

In my opinion, the only way that you can comply with the provisions of said Section 123, above quoted, in regard to disbursements is by publishing **a full and complete itemized statement** of the same, setting out the name of the person to whom the payment was made, the amount paid and the purpose for which the payment was made. In my judgment, a grouping of the disbursements would not suffice.

Cf. Opinion of this office to Hon. S. P. Poyner, Judge of Probate, Houston County, Dothan, Alabama, under date of July 30, 1935, Office Edition, Vol. 5-A, p. 283, a copy of which is enclosed for your information, which said opinion dealt with a statute in regard to the semi-annual publication of reports by county governing bodies, which statute is strikingly similar in language, and identical in legal effect, in so far as the question before us is concerned, to the provisions of Section 123 of the Alabama School of 1927, supra.

It has been suggested that since the statement, which is required to be published by Section 123 of the Alabama School Code of 1927, supra, must be published "at the same time it (the County Board of Education) forwards same to the State Superintendent of Education," it need only contain such information as the State Superintendent of Education requires the County Superintendent of Education to furnish to him on or before the first day of November of each year on blanks which he furnishes to the County Superintendent, pursuant to the provisions of Section 170 of the Alabama School Code of 1927, and that since the State Superintendent of Education only requires a grouping of disbursements and not a full and complete itemization thereof, it is not necessary for the Board to do more than publish a copy of the statement which the County Board of Education furnishes to the State Superintendent of Education. However, in my judgment, the mere fact that the State Superintendent, pursuant to his right so to do, contained in said Section 170 of the Alabama School Code of 1927, supra, only requires a grouping of disbursements in the statement made to him by the County Superintendent of Education, could not operate to overturn or supersede the positive requirement of Section 123 of the Alabama School Code of 1927, supra, that the County Board of Education publish annually in a newspaper at the county seat "a full and complete itemized statement of the *** disbursements *** ."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 1, 1939.

Hon. J. H. Crow, Chairman,
Morgan County School Board,
Decatur, Alabama.

Schools—The fact that the chairman of a school board is president of a corporation does not prohibit said corporation from contracting with said school board.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of September 21, 1939, in which you request my opinion as follows:

"We are writing you for an opinion, based on the following statement of facts.

"The undersigned, chairman of the Morgan County School Board, is president of Crow & Crow Hardware Co., a corporation. Crow & Crow Hardware Co. wish to sell merchandise to the County Schools of Morgan County, and are in a position to sell goods of the highest quality at reasonable prices, but, in view of Sec. 5016 and Sec. 5024 of the Code of Alabama they have not sold goods.

"Please advise if there is a violation of the above sections of the Crow & Crow Hardware Co., a corporation, to sell merchandise to the Morgan County Schools. Your opinion will be appreciated."

I am of the opinion that your inquiry should be answered in the negative.

Sections 5016 and 5024 (as amended by Acts 1936-37, page 225) of the Code of Alabama, 1923, are applicable only to contracts with counties and not to contracts with county boards of education. **Biennial Report of Attorney General 1936-38, page 723; Opinion of Attorney General to Secretary, Russell County Board of Education of July 20, 1939** (copy of which is herewith enclosed).

In the opinon in the Biennial Report of Attorney General 1936-38, page 723, supra, it was held that although Section 5020, Code of 1923, as amended, did not apply to contracts with county boards of education, yet a county superintendent of education could not contract with his board of education for sale of materials and supplies as such contract would be contrary to public policy. This opinion was based upon the theory that the personal pecuniary interests of the county superintendent of education in the contract made such contract unlawful as being against public policy.

In the instant case, the chairman of the school board is president of a corporation which desires to contract with said school board for the sale of material and supplies. The question then presents itself as to whether or not this fact shows such a personal pecuniary interest in the chairman of the school board as to make such contract contrary to public policy. In my opinion, this inquiry should be answered in the negative. A corporation is a distinct entity, to be considered separate and apart from individuals who compose it; and a contract with the corporation is not a contract with the individuals.—**Navoo Hardware Co. v. Bass,** 214 Ala. 553, 108 So. 452. Therefore, it is my opinion that the contract with the corporation in question does not show such personal pecuniary interest in the chairman of the school board who is president of said corporation as to make such contract contrary to public policy. This is in accordance with an opinion rendered to the Judge of Probate of St. Clair County on July 20, 1939 (a copy of which is enclosed) which held that the probate judge of a county, who is also president of an incorporated bank, which buys bonds, warrants and claims from said county,

is not pecuniarily interested in such contract so as to violate Sections 5016 and 5024 (as amended) of the Code of 1923.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 1, 1939.

Hon. L. D. Dix,
President, Jury Commission,
Mobile County,
Mobile, Alabama.

Jury Commission—Counties—

The provisions of Act No. 59, S. 55, approved March 2, 1939, (General Acts, pamphlet 1939, p. 86) relative to the payment of certain compensation and expenses of the Jury Commissions do not alter or amend the machinery of any particular county in regard to the method of paying its claims. Said compensation and expenses should be paid in the same manner as other charges against the county.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your request for official opinion under date of June 14, 1939, which is as follows.

"Under the act approved March 2, 1939, to establish a Jury Commission in each of the several counties, Section 20 reads as follows:

" 'The Judge of Probate of every county shall, upon the request of the President of the Commission, purchase the necessary books in which to keep the jury rolls and the record of the proceedings, and the necessary cards, stationery, and things of all kinds required by the Commission, and shall draw his warrant on the county treasury for the payment of the same.'

"The Jury Commission of Mobile County has requested of the Probate Judge the necessary equipment for its work, and we are advised by the County Attorney that a constitutional amendment applying only to Mobile County, prohibits the Probate Judge from drawing any warrants on the County Treasury, and that requisitions must be made through the Board of Revenue.

"Will you please advise us how to proceed in order that we may have the necessary supplies for the work of the Jury Commission.

"Under Section 8, it is provided that the compensation of the secretary of the Commission shall be 'paid out of the County Treasury upon the order of the President of the Jury Commission.'

"Section 5, providing for the compensation of the Jury Commissioners, states that same shall be 'paid out of the County Treasury upon the warrant of the Probate Judge of the County.'

"Please advise us how the three matters referred to should be handled, and oblige."

Although I am unable to find any constitutional prohibition against the Judge of Probate of Mobile County drawing warrants, yet it appears that county warrants in general are drawn by the Chairman of the Board of Revenue and Road Commissioners of Mobile County.

"Act No. 59, S. 55, approved March 2, 1939, (General Acts 1939, pamphlet p. 86) established the Jury Commissions. Sections 5 and 20 of said act provide as follows:

"Section 5. Each member of the Jury Commission shall be paid the sum of Five Dollars ($5.00) per day for the time actually engaged in the discharge of his duties as such member, **to be paid out of the County treasury upon the warrant of the probate judge of the county.** Such warrants are to be issued by such probate judge upon evidence satisfactory to him that such service has been rendered; but the compensation of each member of the Commission shall not exceed for any year of his term the following amounts, viz: In counties of twenty-five thousand population or less One Hundred Dollars ($100.00); in counties exceeding twenty-five thousand and not exceeding fifty thousand population Two Hundred Dollars ($200.00); in counties exceeding fifty thousand and not exceeding seventy-five thousand population Three Hundred Dollars ($300.00); and in counties exceeding seventy-five thousand population Six Hundred Dollars ($600.00); the population of said respective counties to be determined by the last preceding Federal census." (Italics supplied)

"Section 20. The Judge of Probate of every county shall, upon the request of the President of the Commission, purchase the necessary books in which to keep the jury rolls and the record of the proceedings, and the necessary cards, stationery, and things of all kinds required by the Commission, **and shall draw his warrant on the county treasury for the payment of the same."** (Italics supplied)

It will be noted that the above quoted sections provide that the warrants shall be drawn by the judge of probate of the county. In most of the counties of this State the judge of probate is the official who draws county warrants. This is evently the reason that the judge of probate is specifically named in the two sections above quoted. However, it appears that the general intention of the two sections, from a reading of the act as a whole, was that the county pay for the matters referred to therein. The designation of the judge of probate as the officer to draw the warrants in question was merely part of the machinery of the method of payment. I do not think it was the intention of the Legislature to alter or change the machinery of any particular county in regard to the method of paying claims against the county.

The intention of the Legislature in enacting a law is the law itself, and must be enforced when ascertained, though it may not be consistent with the strict letter of the law.—**J. H. Davis & Co. v. Thomas,** 154 Ala. 279, 45 So. 897. A thing within the intention of the enactment of a statute is as much within the statute as if it were within the letter thereof.—**City of Birmingham v. Southern Express Company,** 164 Ala. 529, 51 So. 159. And the Court in construing a statute must look to the context, the spirit, and the whole, to reach the intent of the Legislature.—**State ex rel. Ellis, v. Griggs,** 287 Ala. 601, 151 So. 850; **Nunas v. Harden,** 226 Ala, 361, 147 So. 166, and cases cited.—**Biennial Report of Attorney General, 1934-36, p. 377.**

The premises considered, it is my opinion that if an official of any particular county, other than the judge of probate, is the one who draws county warrants in general, then said official may be substituted for the judge of probate as used in Sections 5 and 20 of Act No. 59, supra, as regards that particular county.—See **State ex rel. Henry v. State ex rel. Hotel Tutwiler Operating Co.,** 230 Ala. 657, 162 So. 365.

It, therefore, follows that as regards Sections 5 and 20 of Act No. 59, the Chairman of the Board of Revenue and Road Commissioners of Mobile County draws the warrants thereunder instead of the Judge of Probate.

As regards Section 8 of Act No. 59, supra, a slightly different situation exists. Section 8 provides in part as follows:

> "Section 8. In Counties having seventy-five thousand population or less by the last Federal census preceding the employment, the clerk of the Circuit Court may be employed as the Clerk of the Jury Commission and in such counties the Clerk of the Jury Commission whether he be the clerk of the Court or not, shall be paid for his services rendered under the direction of the Jury Commission the sum of Five Dollars ($5.00) per day while actually engaged in performing his duties, **to be paid out the county treasury upon the order of the President** of the Jury Commission. *** " (Italics supplied)

This section provides that the Clerk of the Jury Commission is paid out of the county treasury upon the order of the President of the Jury Commission. Applying the reason set forth, I do not think the Legislature intended in this instance to alter or change the machinery of any particular county in regard to the general method of paying claims against it.

Heretofore, in certain instances, the statutes provided for certain officials to draw warrants for the payment of county claims. In construing these statutes in connection with the County Budget Act (General Acts 1935, p. 803), which provided that only the judge of probate, chairman of the board of revenue or other governing body or such officer as may be designated by such board, could issue county warrants, this office in an opinion rendered to the Clerk of the Circuit Court of Marshall County on October 10, 1935 (Biennial Report of Attorney General 1934-36, p. 330), held that in such instances the official designated to draw the warrants issues orders for the warrants in question to the officer authorized to issue same and who in turn issues said warrants.

Applying the above to the method of paying compensation of the clerk of the jury commission, it follows that the president of the jury commission

instead of drawing the warrant himself, issues an order to the officer of the county authorized to draw the warrant, which officer in turn draws the warrant in question. Therefore, in Mobile County, the President of the Jury Commission would issue an order for the payment of the compensation of the clerk of the Jury Commission to the Chairman of the Board of Revenue and Road Commissioners, who, in turn, would draw the proper warrant.

As heretofore stated, I do not find any constitutional prohibition against the Judge of Probate of Mobile County drawing warrants, yet the above interpretations of the law relative to your inquiries will remove any possible constitutional inhibition as regards Mobile County in respect to the drawing of county warrants.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 3, 1939.

Hon. Frank M. Dixon,
Governor of Alabama,
Capitol.

The heads of the various departments of State government have the authority to appoint auditors and accountants, whose duties are confined to the keeping of books and records incident to the operation of the department. Act No. 112, House Bill 72, approved March 7, 1939, does not give to the Director of Finance the authority to appoint such auditors or accountants.

Opinion by the Attorney General.

Dear Sir:

I have your letter of October 2, 1939, in which you request my opinion as follows:

"It is my information that many of the departments of the State government have in their personnel auditors or accountants, whose duties relate solely to matters of internal accounting.

"For example, in the Highway Department there is a division designated as 'The Division of Accounts,' which division is charged with the duty of keeping records as to the expenses necessary for the operation of each phase of activity carried on by the Highway Department, including costs of administration, materials, supplies, and labor. The said Division of Accounts of the State Highway Department makes no disbursements, its functions with respect to disbursements being confined to the preparing of warrants and vouchers and the submission of the same to the State Comptroller, who makes all disbursements. All of the reports of the Highway Department are first transferred to the Comptroller, who in turn certifies same to the State Treasurer and in no event does the

auditor or accountant of the Division of Accounts of the State Highway Department have any control over the use of any funds, whether Federal, State, County, or special, until the receipt of notice from the State Comptroller that same has been certified to the Treasurer.

"I am informed that the books and records of the Division of Accounts of the State Highway Department are at all times subject to examination by the Examining Department of the Department of Finance, which department makes periodic post-audits of all fiscal records of the State Highway Department, which post-audits are supplementary to the daily pre-audits made by the Comptroller of all expenditures of the State Highway Department before disbursements are made.

"I request your opinion as to whether or not the provisions of Act No. 112, House Bill 72, approved March 7, 1939, give to the Director of Finance the right to name the auditors of the several departments of State government who perform duties similar to those performed by the auditors and accountants of the State Highway Department, as detailed above."

The answer to your question necessarily involves the construction of several provisions of the Department of Finance Act, Act No. 112, House Bill 72, approved March 7, 1939. The pertinent provisions of that act are as follows:

"Section 3. CREATION OF THE DEPARTMENT OF FINANCE. There is hereby created the Department of Finance of the State of Alabama, which shall be an executive and administrative department, in order to enable the Governor to exercise a direct and effective control over the finances of the State and in order to bring together in one department for purposes of economy and efficiency all matters pertaining to the finances of the State and the departments, boards, bureaus, commissions, agencies, offices and institutions thereof *** ."

"Section 5. FUNCTIONS AND DUTIES OF THE DEPARTMENT OF FINANCE. The general functions and duties of the Department of Finance shall be as follows: (1) To manage, supervise and control all matters pertaining to the fiscal affairs and fiscal procedure of the State, except such as may by the Constitution and statute be specifically required to be performed by the State Auditor, the State Treasurer, and the State Tax Commission or its successor, and to keep all records, accounts and data relating thereto. *** (15) To examine and audit the records and accounts of all state and county officers, bureaus, boards, commissions, institutions and departments as now provided by law or which may hereafter be provided by law; *** "

"Section 21. THE DIVISION OF CONTROL AND ACCOUNTS; THE COMPTROLLER. There is hereby established in the Department of Finance the Division of Control and Accounts, which shall be headed by and be under the direction, supervision and control of an officer, who shall be designated the Comptroller, to be appointed by the Director of Finance, with the approval of the Governor. The functions and duties of the Division of Control and Accounts shall be as follows: (1) To keep all books, records and accounts relating to the finances of the State government (including the budget accounts) which are authorized or required to be kept by the Department of Finance, in accordance with

recognized standards of public accounting and in such a manner as at all times to reveal the true financial status of the State government and of each special fund and account in the State Treasury. (2) To control and make records of all payments into and out of the State Treasury and each special fund and account therein. (3) To audit correctly all receipts and receivables. (4) To pre-audit and determine the correctness and legality of every claim and account submitted for the issuance of a warrant and to determine that funds have been appropriated and allotted and are then available in the State Treasury for the payment of such claim or account before any warrant on the State Treasury shall be issued, except that the pre-audit of claims for unemployment compensation or Confederate pensions or public assistance or child welfare shall be performed by the department or departments having charge of the other functions and duties relating to the unemployment compensation, Confederate pensions or public assistance or child welfare, subject to the general supervision of the Division of Control and Accounts. (5) To draw every warrant authorized to be drawn upon the State Treasury and any fund therein, whether a special or earmarked fund or not. No warrant shall hereafter be drawn on the State Treasury by the State Auditor or any other officer or employee of the State except a duly authorized officer or employee of the Department of Finance, except that all warrants for the payment of unemployment compensation or Confederate pensions or public assistance or child welfare benefits or claims shall be drawn by the department or departments having charge of the other functions and duties relating to unemployment compensation, Confederate pensions, public assistance or child welfare subject to the general supervision of the Division of Control and Accounts. (6) To prepare all accounting forms to be used in or by all departments, boards, bureaus, commissions, agencies, offices and institutions of the State. When prepared such forms shall be used exclusively by the departments, boards, bureaus, commissions, agencies, offices and institutions of the State for which they were prepared. (7) To secure such information and data, to prepare or make such studies and reports and to perform such other functions and duties of the Department of Finance as may from time to time be assigned by the Director of Finance."

"Section 28. EMPLOYEES OF THE DEPARTMENT OF FINANCE. The Director of Finance shall, with the approval of the Governor, determine the number of employees needed for the efficient and economical performance of the functions and duties of the Department of Finance and the salaries to be paid all such employees. All employees heretofore employed by any department, board, bureau, commission, agency or office in connection with any of the functions or duties which have been transferred to and conferred upon the Department of Finance by this Act, the right to appoint or nominate such employees, and all appropriations for the payment to such employees, are hereby transferred and assigned to the Department of Finance. The Director of Finance shall however, have the right to discharge any such employee, if, in his discretion, he shall conclude that the services of such employee are not needed or that the efficiency of the Department will be increased by the replacement of such employee. Employees determined to be needed and not transferred from some other department, board, bureau, commission, agency or office of the State and employees to replace any employees so transferred shall be appointed by the Director of Finance."

The question, as I see it, is whether or not the above quoted provisions of law give to the Director of Finance the power to appoint auditors or ac-

countants to handle departmental accounting in the various departments of the State.

I am of the opinion that your inquiry must be answered in the negative. I do not believe that it was the legislative intent to invest the Director of Finance with authority to name the auditors or accountants for each and every department of State government.

The only basis for coming to the conclusion that the Director of Finance does have such authority would be to construe those parts of the above quoted law which say that the Director of Finance shall have charge of the financial and fiscal matters of the State and all departments thereof as giving him such authority. If those provisions give him the authority to appoint auditors or bookkeepers because they perform duties incident to or connected with the financial or fiscal functions of State government, then it would naturally follow that the Director of Finance would likewise have complete control of the expenditure of all funds of all the departments of the State of Alabama. I do not think this was the legislative intent.

In my judgment, the Legislature intended that each of the various departments of the State of Alabama should maintain its own department of accounts, if such department is needed, subject to the right of the Director of Finance to pre-audit all expenditures and to post-audit such accounts. I do not mean to say that the Director of Finance is not charged with the duty of auditing or examining the books and records of the various departments of the State government. Such is its mandatory duty as fixed by the statute itself.

In my opinion, complete centralization of the State's accounting system has been recognized by the Legislature as being entirely impractical, due to the volume of work, the geographical distance between the Capitol and various State institutions and offices, and the need for having certain data readily available to the administrative officials concerned. Each department directly concerned with a transaction must keep certain records regardless of whether or not there is a central accounting unit. Certainly it could not be expected for the State Department of Health, the State Educational Department, the Department of Agriculture and Industries, the Public Welfare Department, and the Alcoholic Beverage Control Board to function properly without all complete records. I think it was the legislative intent that the directing authority of each such department should have the same right to appoint auditors and accountants to perform its accounting functions as it has to appoint officers or employees to perform other functions.

I wish to call to your attention the case of **State ex rel. Junk v. Herrick,** 140 N. E. 314 (Ohio), wherein a question similar to the one with which we are confronted was presented to the Supreme Court of Ohio.

In that case a statute of the State of Ohio was involved, which statute is in part as follows:

> "The Department of Finance shall have power to exercise control over the financial transactions of all departments, offices and institutions, excepting the judicial and legislative departments, *** "

A contractor who had been awarded a contract for the construction of a certain highway brought a suit in mandamus against the Director of Highways and Public Works of Ohio, in an effort to require such director to sign, execute, and enter into said contract on behalf of the State of Ohio. The defendant, the Director of Highways, admitted that all conditions had been met except that the Director of Finance of the State of Ohio had not given his approval to the contract. The question was submitted to the Court as to whether or not the Director of Finance possessed the authority to pass on such contracts.

The Supreme Court of Ohio, among other things said as follows:

"While performance of the functions of both of those departments is necessary in the orderly administrative processes of government, the best evidence of the legislative intent that those functions should be regarded as separate and distinct from each other is found in the fact that they were placed in separate and distinct departments, and each of those departments placed in charge of separate and distinct responsible functionaries.

"It is true that the department of finance is first named and it may be conceded that none of the other departments ranks greater in importance, yet it does not follow that its importance is such as to overshadow all the others and to completely reduce them to a state of impotence. If any illustration is necessary to show that such power and authority in the director of finance as claimed in this case if applied to all the other administrative branches of the state government, would completely submerge the other branches and put it within the power of the director of finance to completely defeat and destroy the usefulness of the other branches, that illustration is found in the facts of the present controversy.

"We shall not attempt in this proceeding to define the duties and the limitations of the director of finance in his relations to the directors of the other departments, but we do find it necessary and do not hesitate to say that his duties do not reach even in the remotest degree to a control of the policies of the department of highways and public works."

In view of the above, it is my opinion that the Director of Finance does not possess the authority to appoint an auditor or accountant who performs such duties as those outlined in your letter.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 4, 1939.

Hon. Grady R. Williams,
Judge of Probate,
Lauderdale County,
Florence, Alabama.

Sales Tax—

Under facts stated, transactions with tailoring shop by which such shop ordered suits from without the State for resident customers held not interstate commerce and subject to sales tax (General Acts 1939, p. 16).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 1, 1939, requesting my opinion as follows:

"We have a tailoring shop here which takes orders for men's suits and sends the order to Chicago and the suit is shipped C. O. D. to the tailor who collects from the customer and then goes to the Post Office and gets the suit and delivers it to the customer within less than twenty-four hours. It is my understanding that a sales tax is not required in such a case because the law provides that shipments in interstate commerce must remain in the seller's possession for as much as twenty-four hours before a tax can be collected. The tailor has not collected the tax in such cases because he thought the transaction being an interstate commerce one, was not subject to tax.

"Please advise me as to the above."

In a subsequent letter you have advised that the customers always accept the suits and they are delivered to such customers without alteration or other kind of service. I assume also for the purpose of this opinion that the suit is billed by the manufacturing company to the tailoring shop inasmuch as you state that the goods are shipped C. O. D. to such tailoring shop rather than C. O. D. to the customers. In my opinion, the tailoring shop should have collected the sales tax on the transactions which you mention. An analogous situation was presented recently to the Supreme Court of Alabama in the case of **Graybar Electric Company, Inc. v. John C. Curry et al**, 3rd Div. 291 (MS).

In that case certain sales were made under the following circumstances:

"Each sale was made after an order had been received from complainants, said order being in substantially the following form:

" 'Graybar Electric Company, 1529 First Avenue North, Birmingham, Alabama. Please furnish us the following articles, 204-1000 Watt, 260 Volt, Mazda Lamps at $4.75 each. It is agreed that the material covered by this contract shall be manufactured at the plant of the General Electric Company located in the State of Ohio and

shipped in interstate movement from said plant to destination, shipped via freight to Tennessee Coal, Iron and Railroad Company, Construction Stores, Fairfield, Alabama. (Signed). Tennessee Coal, Iron and Railroad Company, by Richard Shively, Purchasing Agent.'

"The Graybar Company on receipt of such order, would then order the specified articles from General Electric Company, located in Ohio, and instruct said company to ship the same f. o. b. factory in Ohio, consigned to the customer at Fairfield, Alabama. General Electric Company would then ship the goods f. o. b. factory to Graybar Company's customer in Alabama. After each such shipment the General Electric Company would send its invoices to the Graybar Company, and the company would send its invoices to the respective customers. The goods were billed by the General Electric Company to Graybar Company, and the latter paid the same. The Graybar Company then rendered its bills to its customers and the same were paid by them to it."

The court speaking through Mr. Justice Knight, in considering the foregoing facts, held the Graybar Company liable for the payment of the 2% tax assessed under the Sales Tax Act. The court stated:

"These goods were ordered by the customers in Alabama, from the complainant in Alabama, for consumption here. In the orders the cost price of the goods which the customers were to pay was stated and fixed, and agreed on, in each order. These orders were accepted by the complainant in Alabama, and carried with them the agreement that the goods were to be delivered to the purchasers in Alabama. It was no benefit to the purchasers that the goods were to be shipped 'in interstate movement' for the reason that the price of the goods would be the same, whether shipped 'in interstate movement' or not. Evidently this provision as to 'interstate movement' was to preclude, if possible, the imposition of a sales tax on the goods in Alabama. The transactions were Alabama sales within the provision of the Alabama Sales Tax Law. The form or language of the customers' orders cannot affect the case.

"It is not 'within the power of the parties, by the form of their contract, to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause.'—**Superior Oil Co. v. State of Mississippi ex rel. Rush H. Knox, Attorney General,** 280 U. S. 390-396; **Browning v. Waycross,** 233 U. S. 16, 23, 58 L. ed. 828-832, 34 S. Ct. Rep. 578.

"The facts of the case must determine whether it falls within the protection of the commerce clause of the Federal Constitution, and not the words of the contract. The desire to make its act an act in commerce among the states is unimportant, when the facts show it to be otherwise.—**Superior Oil Co. v. State of Mississippi ex rel. Rush H. Knox, Attorney General, supra. Banker Bros. v. Penn.,** 222 U. S. 210, 56 L. ed. 168. See also **Curry v. Feld,** 190 So. 88.

Applying the foregoing statement to the instant case, it appears that the suits were ordered by the customers in Alabama from the tailoring shop in Alabama for consumption here. The cost price of the goods which the customers were to pay was stated and fixed and agreed on in each order as reflected by the fact that the goods were shipped C. O. D. The orders were

accepted by the tailoring shop in Alabama and carried with them the agreement that the goods were to be delivered to the purchaser in Alabama. The fact that the goods were to be delivered without change clearly demonstrates that the sale had been finally consummated.

You are, therefore, advised that the tailor should have collected the tax in the cases described in your inquiry, the transactions not being interstate commerce. The fact that the suit is delivered to the customer within less than twenty-four hours would not affect the matter. Your attention is directed to the fact that this twenty-four hour provision which was a part of the Luxury Tax Act is no longer to be found in the Sales Tax Act of 1939 (General Acts 1939, p. 16).

May I further call your attention to Act No. 67, H. 83, approved February 28, 1939 (General Acts 1939, p. 96), the so-called "Use Tax Law", which imposed a 2% tax on the storage, use or other consumption in Alabama of tangible personal property purchased at retail on or after February 28, 1939, and on which the 2% tax levied by the Sales Tax Act, supra, has not been paid. Under the provisions of the Use Tax Statute, if such transaction could be held to be interstate commerce, the tax is nevertheless required to be paid by the customer, but in this instance it would be his duty to report such purchases to the Department of Revenue and to pay the tax thereon to that agency. Thus you see that under the 1939 statutes, whether the sale be intrastate or interstate commerce, the tax must be paid. In the first instance, the vendor must collect the tax from his customers and in the second, it is the duty of the purchaser to report such purchases to the Department of Revenue and pay the tax thereon to such agency if the use tax has not been reported and paid by the vendor.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 4, 1939.

Hon. W. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Deeds—Deed Tax—

Deed tax held due on full value of property sold, when said sale includes present payment of existing mortgage.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your request for official opinion under date of September 5, 1939, which follows:

"There was filed for record in this office a Warranty Deed covering a transaction as follows:

"The property covered by this deed had a mortgage resting on same on which a mortgage tax had been paid, but the new purchaser paid this mortgage in full and paid the difference or equity to the owner of this property and then placed a mortgage to a third party.

"This office insisted on the full amount of the deed tax holding that in the purchase of this property the purchaser had not assumed the mortgage resting thereon, but in the purchase of the property had made one complete transaction paying the mortgage off and equity to the owner of the property, and therefore full deed tax must be paid.

"Our position has been attacked by the attorneys filing these papers. They admit they did not assume the mortgage, but paid the mortgage in full at the time of the purchase but in view of the fact that the mortgage tax had been paid on the original mortgage they are entitled to this credit on the deed tax. They call our attention to Schedule 46, Deeds, Bills of Sale, etc., in which it states: 'Provided that only the value in excess of any mortgages or vendor's lien upon any property within this State on which the mortgage tax has been paid, shall be taxable under this Schedule.' They hold that the fact that there was a mortgage at the time of the sale but was removed by the sale makes no difference that they are still entitled to this credit. We held the fact that this mortgage was not assumed but retired by the sale that they were entitled to no credit. You will note that this is a very fine point for the reason that if a deed was drawn assuming this mortgage and five minutes after filing this deed this mortgage was cancelled they would have been entitled to credit. So for this reason I am calling your attention to Article 77 of the U. S. Government Stamp Act Law which reads as follows:

> " 'Tax, how computed.—In calculating the amount of stamps which must be affixed to a deed of conveyance, the tax is computed upon the full consideration for the transfer less all encumbrances which rest on the property before the sale and are not removed by the sale. Encumbrances placed on the property in connection with and as a result of the sale or transfer, as well as notes for the deferred payments can not be deducted in determining the amount upon which tax is calculated.'

"You will note that the Government is very specific and states that no credit can be given where the encumbrances are removed by the sale. The State law is not quite as explicit."

In reply, I wish to advise that in my judgment your interpretation of the law controlling your statement of facts is correct.

The sale involved in your request is clearly a sale for the entire interest of the property, since the purchaser has paid for both the equity of the seller and the outstanding mortgage obligation against the property at the time of the sale as a single transaction. The law, in my judgment, restricts the exemption provided here, to mortgages assumed by the purchaser, or to

property sold subject to a mortgage, and in either event, then only when a tax has been paid for the recording of such mortgage.

See Biennial Report of Attorney General, 1930-32, page 1046; Biennial Report of Attorney General, 1932-34, page 616.

It is true that circumstances may be present which would allow the payment of a deed tax on a cash payment and a mortgage tax on the remainder of the purchase price, when both such instruments are filed for record. See **State ex rel. Blue v. Stiles, Judge of Probate,** 102 So. 901, 212 Ala. 468. Your statement of facts, in my judgment, will not meet the requirements of law for either of the above exemptions.

The determination of the true amount of tax to be paid on an instrument offered for recordation is a matter which addresses itself to the probate judge.

Long, Judge v. Jasper Land Co., 217 Ala. 593, 117 So. 210, 211; **Thompson, Probate Judge v. Smith,** 27 Ala. App. 460, 174 So. 796.

In my judgment, the fact that the purchase price of the property here concerned included the amount of the then existing mortgage which by the terms of the sale was satisfied and paid in full, cannot operate to preclude the probate judge from determining that the true consideration for the deed offered for record is the full value of the property sold, which is the interest here received by the purchaser in this transaction. See Quarterly Report Opinions of Attorney General Vol. XIV, page 139.

The premises considered, it is my opinion that Section 21½ of the Revenue Laws of 1935, quoted by you, requires the payment of a deed tax on the full value of the property. In my judgment, the new mortgage executed to a stranger to the above considered transaction cannot in any manner affect the holding here announced.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 4, 1939.

Hon. Powell Hamner,
Sheriff, Walker County,
Jasper, Alabama.

Sheriff not entitled to compensation for attending regular terms of criminal court.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 26, 1939, in which you request my opinion as follows:

"Please furnish me with the following opinion:

"Under Section 3741, Code of 1923, are the Sheriffs entitled to court attendance in criminal jury courts?

"On June 30, 1939, I filed a claim against the County for four days Criminal Jury court attendance at the rate set out under Section 3741 and was paid by the Board of Revenue. Since that time the Auditors have charged me back with the eight dollars. Are we entitled to this?"

I wish to refer you to Section 3741, Code of Alabama 1923, wherein is listed the following fees for sheriffs for performing certain Services:

"For summoning jury in capital case, or at any special court for the trial of criminal to be paid out of the county treasury $5.00

For attendance each day on such court to be paid by the county $2.00"

If you have collected for attending the trial of criminal cases at the regular term of criminal court, the examiners are correct in charging the monies which you have collected back to you.

The Supreme Court of this State has definitely passed on this matter in the case of **Torbert v. Hale County,** 131 Ala. 143, 30 So. 453, wherein it was held:

"As the second count predicates the plaintiff's right of recovery for attendance upon the regular terms of the circuit court when engaged in the trial of criminal cases, and not for attendance upon special terms of that court held for that purpose, the demurrer to it was properly sustained."

Cf. Opinion rendered to Sheriff of Randolph County, Alabama, on June 10, 1935, Biennial Report of Attorney General 1934-1936, page 173.

However, if the money which you have collected from the county was in payment of services performed by you in attending a special term of criminal court, then the auditors should not make a charge against you and your bondsmen.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 4, 1939.

Hon. E. S. Johnson,
Clerk, Circuit Court,
Cherokee County,
Centre, Alabama.

Action of a court in making the entry of a nolle prosequi conditional on payment of clerk's and sheriff's fees does not affect right of witnesses in case from collecting their fees from fine and forfeiture fund.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 25, 1939, in which you request my opinion as follows:

"The judgment entry in the Circuit Court of this county in a criminal case for violation of the prohibition law is as follows: 'Nol prossed on payment of Clerk and Sheriff costs'.

"I would like to be advised whether under such judgment, I, as Clerk of the Circuit Court, am authorized to issue to State witnesses the certificate provided for under Section 3769 of the Code of 1923 and whether the State witnesses in this case are entitled to be paid from the fine and forfeiture fund of the county.

"I note from the opinion of the Attorney General, Biennial Report, October 1, 1936-September 30, 1938, that there is no authority of law which permits the Judge of a County Court to enter nol pros. in a case on condition that the defendants pay the costs and that any attempt of the court to impress a condition of this nature is absolutely void and without authority. (Such opinion being on pages 150-152 of such Biennial Report.) It would like to know if such rule applies as well to a Judge of the Circuit Court of this (Cherokee) County."

My answer to your first inquiry is in the affirmative. Such certificates should be issued under Section 3769 of the Code of Alabama of 1923 and paid out of the fine and forfeiture fund provided for in Section 4039, Code of Alabama, 1923, as amended by an Act approved February 18, 1937, General Acts 1937, page 45. Biennial Report of Attorney General 1934-36, page 367; Biennial Report of Attorney General 1934-36, page 596.

I do not think that the order of the court basing its action in entering a nolle prosequi on the payment of certain costs by the defendant affects the right of witnesses in the case to collect their fees out of the fine and forfeiture fund. Nor would it affect the right of such officers to so collect. Of course, it is necessary for an execution to be issued and returned "No property found" before such officers' fees could be paid out of the fine and forfeiture fund in nol. prossed cases, then the question would be presented as to the legality of an order or judgment of nolle prosequi conditioned on payment of costs because execution cannot issue without a valid judgment for costs.

It is generally understood that when a case is nol. prossed the State has in effect said the defendant is not guilty and should not be penalized. It is for this reason that I express some doubt as to the court's action in making a nolle prosequi conditional. It is not the prerogative of this office, however, to say that a circuit court does not have a right to do a certain act.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 4, 1939.

Hon. S. L. Johnson,
Clerk, Circuit Court,
Calhoun County,
Anniston, Alabama.

Where defendant is granted a parole by Governor subsequent to his paying the clerk the fine and costs imposed upon him, the fine and costs cannot be refunded if the clerk, at the time the parole was granted, has made distribution of said money.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated September 8, 1939, which follows:

"Re: State of Alabama vs. Kaylor Bomar.

"In the above styled cause the defendant was convicted in this court for violation of the prohibition law and fined $50.00 and sentenced for same and costs. He took an appeal and the same was affirmed.

"He applied for executive clemency and the same having been delayed for some time, he in the meantime paid the fine and costs into the hands of the clerk. The clerk made the proper distribution of the fine and costs on or before Oct. 6, 1938. On December 19, 1938, the Governor issued to him, the defendant, a full pardon. No extra hard labor sentence had been imposed.

"In view of the above facts is there any way that fine and costs, or either, may be refunded to the defendant?"

I note from your letter that the defendant was finally given a pardon. From an examination of his file in the office of the Board of Pardons and Paroles, I find that he was given a parole pending good behavior. There is nothing in the file which indicates that the Governor ever entered an order remitting the fine in this case.

In my opinion, it is not necessary to go into the question as to what would be the effect of a remission on the part of the Governor, after the fine and costs had been distributed. The parole pending good behavior extended to the defendant does not operate as a remission of the fine and costs theretofore paid.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 5, 1939.

Hon. Coma Garrett, Jr.,
Judge of Probate,
Clarke County,
Grove Hill, Alabama.

Solicitor—That part of Section 751 Code of Alabama, 1923, which provides for solicitor to receive ten per cent of the amounts collected for performing the duties imposed by said section, is unconstitutional. However, after the invalid part of Section 751, supra, is deleted, said section is complete within itself, sensible and capable of execution and remains in full force and effect.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated September 12, 1939, which follows:

"About five years ago a State Examiner certified a defalcation in the accounts of the County Treasurer of School Funds in this County and Hon. F. E. Poole as Solicitor of this circuit filed suit against said Treasurer of School Funds and his bondsmen. He recovered $25,000, which was paid to the succeeding County Treasurer of School Funds. He then presented to the Court of County Commissioners of this County his claim in the sum of $2500.00 under the provisions of 751 of the Code of 1923.

"An opinion was rendered by Hon. A. A. Carmichael who was then Attorney General of Alabama under date of February 21, 1935 holding that this commission to the solicitor is payable out of county funds and not out of school funds, although the recovery went into the school treasury. That opinion did not touch upon the constitutionality of Section 751 in so far as it purports toward this fee or commission to the Solicitor.

"We discussed the matter with our County Attorneys and they expressed the opinion that Section 751 is unconstitutional in so far as it purports to allow the Solicitor a fee for the collection of money. I thereupon requested a further opinion from Hon. A. A. Carmichael as to the

constitutionality of this Code section but I am unable to find any opinion rendered by him on that subject. It is my recollection that he stated to me verbally that it was his opinion that the section is unconstitutional in the respect indicated.

"On yesterday, at the regular meeting of the Court of County Commissioners, Mr. Poole brought the matter to our attention and urged that his claim be allowed and paid.

"The purpose of this letter is to request your official opinion on the following points:

"1. Is Section 751 of the Code of Alabama constitutional in so far as it purports to allow the Solicitor a fee of 10% for the collection of money from defaulting County officials?

"2. If so, should the County pay out of its funds a commission to the Solicitor for the recovery of school money from a defaulting School Treasurer?

"I am herewith enclosing a copy of the opinion which was rendered to us on February 26, 1935 by our County Attorney, John E. Adams; his opinion might be of some service to you in tracing out the question."

Section 751 Code of Alabama, 1923 is as follows:

"751. Defaulting officers; proceedings to compel payment.—If the defaulting officer fails to settle or to show just cause why the amount should not be collected, the examiner must certify such facts to the state auditor, who shall notify the attorney-general of the amount due the state, and the attorney-general shall bring suit in the name of the State of Alabama against said officer and his bondsmen. If the amount due by said officer is in favor of the county, then the examiner shall certify to the solicitor of the circuit, or other court having jurisdiction, the amount or amounts so due, and such solicitor shall proceed to collect the same by suit against the officer and his bondsmen. For this additional service solicitors shall receive ten per cent of the amounts collected, to be paid out of the county treasury immediately."

It will be noted that under the provisions of that section the solicitor is allowed up to ten per cent of the amounts collected for performing the duties imposed upon him by the above quoted section. The question is now raised as to whether this provision of said section, supra, is constitutional. I think not.

Section 167 of the Constitution of 1901 provides as follows:

"A solicitor for each judicial circuit or other territorial subdivision prescribed by the legislature, shall be elected by the qualified electors of those counties in such circuit or other territorial subdivision in which such solicitor prosecutes criminal cases, and such solicitor shall be learned in the law, and shall at the time of his election and during his continuance in office, reside in a county (in the circuit) in which he prosecutes criminal cases, or other territorial subdivision for which he is elected, and his term of office shall be four years, and he shall receive no other com-

pensation than a salary, to be prescribed by law, which shall not be increased during the term for which he was elected; provided, that this article shall not operate to abridge the term of any solicitor now in office; and, provided further, that the solicitors elected in the year nineteen hundred and four shall hold office for six years, and until their successors are elected and qualified; and provided further, that the legislature may provide by law for the appointment by the governor or the election by the qualified electors of a county for a solicitor for any county."

It will be observed that the above section, supra, provides that the solicitor **shall receive no other compensation than a salary, which shall be prescribed by law, which shall not be increased during the term for which he was elected.** The Supreme Court of Alabama in the case of **Brandon, Auditor v. Askew, Solicitor,** 172 Ala. 160, 54 So. 605, held that there is a clear distinction between a "salary" and "fees," "Costs," "commissions" or "percentages." In said case, supra, Mr. Justice Sayre made the following statements:

"A salary is a fixed compensation 'decreed by authority, and for permanence,' is paid at stated intervals, and depends upon the time, and not the amount of services rendered. Dane v. Smith, 54 Ala. 47, Benedict v. United States, 176 U. S. 357, 20 Sup. Ct. 458, 44 L. Ed. 503."

Also:

"Allowances are of the same nature with fees, costs, commissions and percentages. They are uncertain and variable in amount. They depend upon the rendition of services which may or may not be required or performed, and sometimes upon the discretion of the court ordering their payment."

Applying the definitions of the words "salary," "fees," "costs," "commissions," "percentages" and "allowances" as defined by our Supreme Court, supra, to that part of Section 751 Code, supra, which provides that the solicitor is entitled to ten per cent of the amounts collected for performing the duties imposed by said section, we find that the compensation provided for in Section 751, supra, is not a "salary" but falls in the class of a "fee" or "allowance." This compensation of the solicitor is not a fixed compensation, payable at stated intervals, but is one which is uncertain, variable in amount and depends upon the rendition of service. It being true that the compensation provided for in Section 751, supra, is not a "salary" but is in the nature of a "fee" or "allowance" we immediately run into the inhibition of Section 167 of the Constitution, supra, which provides in part that "the solicitor shall receive no other compensation than a salary."

It was held by our Supreme Court in the case of **Tayloe v. Davis,** 212 Ala. 282, 102 So. 433 that when new and additional duties are imposed upon a public officer he may be rewarded extra compensation without a violation of Section 281 of the Constitution. This rule, however, is not applicable to the present case as Section 751, supra, attempts to compensate a solicitor by an allowance or fee for his services and such compensation is expressly prohibited by that part of Section 167 of the Constitution, supra, which provides that "the solicitor shall receive no other compensation than a salary." In my opinion, solicitors can be awarded extra compensation for new and additional duties only by an increase of their salary.

It is therefore my opinion that that part of Section 751, supra, that provides for the solicitor to receive ten per cent of the amounts collected for performing the duties imposed by said section is unconstitutional. However, after the invalid part of Section 751, supra, is deleted, said section is complete within itself, sensible and capable of execution, and remains in full force and effect. **Springer v. State ex rel. Williams,** 157 So. 219, 229 Ala. 339.

The answer to your first inquiry obviates an answer to your second.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 5, 1939.

Hon. W. H. Quillin, Judge,
Law and Equity Court,
Franklin County,
Russellville, Alabama.

Costs and Fees—Act No. 156, S. 143, approved March 16, 1939 (General Acts 1939, pamphlet p. 229), does not apply to violations of Act No. 192, S. 174, approved July 17, 1935 (General Acts 1935, p. 240), viz., passing a school bus or other vehicle when taking on or discharging school children, and trial tax and solicitor's fees should be taxed in bill of costs for violation of said act.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of September 19, 1939, in which you request my opinion as follows:

"A defendant pleads guilty in the Law & Equity Court of Franklin County on a charge of violating Act No. 192, approved by the Governor July 17, 1935. (General Acts of Legislature of 1935, page 240). Should a Solicitor's Fee and Trial Tax be taxed in the bill of costs? I have in mind also Act No. 156, approved by the Governor March 16th, 1939.

"Please let me have your opinion."

I am of the opinion that your inquiry should be answered in the affirmative. Act No. 156, S. 143, approved March 16, 1939, (General Acts 1939, pamphlet p. 229) has no application to a violation of Act No. 192, S. 174, approved July 17, 1935 (General Acts 1935, p. 240).

Act No. 156 of the 1939 Legislature, supra, provides in pertinent part as follows:

"Section 1. That in all misdemeanor cases for violation of the State Highway Code, the State Highway Patrol Act and the rules of the road cognizable in Justice of the Peace courts, courts created in lieu of Justice of the Peace Courts, County Courts, Inferior Courts, Law and Equity Courts, or courts of like jurisdiction, where the defendant pleads guilty and no appeal is taken, no fee shall be taxed or collected in said courts for trial, solicitor's fees, or entering judgment in such cases."

Act No. 192 of the 1935 Legislature, supra, provides in pertinent part as follows:

"Section 1. That every person using, operating or driving a motor vehicle upon or over the roads and highways of the State of Alabama, when approaching a school bus, or other vehicle engaged in transporting school children, bring said motor vehicle to a complete stop, while said school bus, or other vehicle used in transporting school children, is engaged in taking on or discharging school children."

Although Act No. 192, supra, deals with a violation which occurs on the highway, it is an independent act, and, in my opinion, does not come within the purview of the categories specifically enumerated in Act No. 156, supra. Therefore, Act No. 156 has no application to Act No. 192 and the trial tax and solicitor's fee should be collected on conviction of a violation thereof.

The above is in accordance with the theory of former opinions of this office which hold that the fines and forfeitures for violations of Act No. 192, supra, go to the fine and forfeiture fund of the county. Quarterly Report of Attorney General, Vol. VII, pp. 54 and 55.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 5, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Taxation—Exemptions—Tax Assessor—Personal property.

A taxpayer who does not assess his property on or before the third Monday in January of the current tax year, waives his personal property exemptions, and if same is allowed, it should be charged back to the Tax Assessor.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion under date of September 18, 1939, which follows:

"Please refer to Sections 29, 31 and 38 of the 1935 Revenue Act, and to your opinions in Vol. I, page 303, Vol. VIII, page 316, and Vol. X, page 27, and advise me in answer to the following question:

"Where a taxpayer assesses his property after the third Monday in January and claims his **personal property** exemption and the same is allowed by the Tax Assessor, should not this exempted property be charged back to the Assessor at a 60% valuation plus the 10% penalty?"

Before proceeding with an answer to your request, I wish to direct your attention to an opinion of this office under date of December 4, 1935, Quarterly Report Attorney General, Vol. I, page 303, in which it was held that property, even though exempt, must be assessed. I also wish to call your attention to another opinion of this office under date of January 5, 1938, Quarterly Report Attorney General, Vol. X, page 27, in which it was held that the homestead exemption allowed under the 1935 Revenue Law, must be claimed on or before the third Monday in January of the current tax year, otherwise such exemption was waived. An opinion of this office under date of September 27, 1937, Quarterly Report Attorney General, Vol. VIII, page 316 , held that exemptions provided for blind persons under the 1935 Revenue Law must be claimed on or before the third Monday in January of the current tax year, and if not so claimed, the same were forfeited.

It is true that the exemptions dealt with in the above opinions are all exemptions of real property. It is also true that personal property exemptions are contained in the same act which the above opinions deal with, viz., the Revenue Act of 1935.

I am unable to see why a different rule should obtain in regard to personal property exemptions from the rule that is applied to real property exemptions. This fact is made stronger in light of the fact that both exemptions are contained in one and the same act.

It is, therefore, my opinion, based on the above referred to opinions of this office, that a taxpayer who failed to make a return of his taxes on or before the third Monday in January of the current tax year, waives any exemptions allowed him under the Revenue Laws of this State. This, in my opinion, applies to personal property exemptions as well as to other exemptionts allowed by law.

It, therefore, follows that since the taxpayer in question has waived his personal property exemptions, the same should not have been allowed by the Tax Assessor. Therefore, this exemption should be charged back to the Tax Assessor together with the penalty as provided by law.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 5, 1939.

Hon. Chester Walker,
Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Drivers' Licenses—Act No. 181 (General Acts, 1939) approved March 18, 1939, and effective September 30, 1939—

1. Judge of Probate should require application for driver's license to be filled out in accordance with the instructions for filling out same contained on the application before receiving the application and collecting the fee required by law.

2. Applicant who pays required fee at the time of making application for driver's license, but whose license mailed by the Director of Public Safety never reaches him, not required to pay twenty-five cent fee for a duplicate license.

3. If Director of Public Safety rejects application for a driver's license, applicant not entitled to a refund of the fee he is required by law to pay at the time of making application.

4. Person who now possesses a 1939 driver's license has until November 14, 1939, to make application for a new driver's license.

5. Person applying for driver's license who has no permanent residence address should give his address at the time of making application for license, and when such is done, application should not be rejected because the person has no permanent residence address.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of September 14, 1939, in which you request my opinion as follows :

"Quite a bit of confusion exists on account of the procedure to be followed in issuing drivers license under a law enacted by the recent Legislature known as House Bill No. 245 by Hill approved March 18, 1939 which act begins on page 300 of the General Laws of the Legislature of Alabama 1939 session. Section 2 of the acts provides that the applicant shall apply under oath to the Judge of Probate of the county of his residence. Said application shall be made on a form which shall be provided by the Director of Public Safety and pay the Probate Judge the fee of $1.10 and secure a receipt therefor. The form provided is causing much confusion. It compels applicants to hire some typist or Notary Public to make out the application for them if the form which has been prepared must be strictly complied with. I enclose you herewith a copy of the application and instructions. This form certainly will cause added expense to the county if the Probate Judge fills out applications that must be printed or typewritten. On the other hand if the Probate Judge

does not fill out the applications many poor people that do not possess a typewriter and who cannot write or print will have to hire some one to fix the application for them. They are not financially able to do this even though it costs them only 25 or 50 cents. It appears to me that this form works a hardship on the people that the government is supposed to serve and that it can be eliminated by a liberal interpretation of the law without affecting or hurting the purpose of the State Government. With this law in mind I submit you the following questions and request your opinion.

"1. Does the law require the Probate Judge to reject an application presented to him that is not typewritten or printed in black ink if the application is written in plain legible hand writing?

"2. Does the law require the Probate Judge to reject an application where the other information required is given but which application does not have the middle name or maiden name as the case may be written into the application?

"3. Have the clerks in the Probate Office other than the Chief Clerk the legal authority to administer oaths as required under the law? If so do they do this in their own name as clerk or in the name of the Probate Judge?

"4. Will the applicant who deposits the amount required to purchase license be required to pay 25c for duplicate license in a case where the license is issued by the Director of Public Safety and mailed to him but does never reach its destination through the mails?

"5. Should the Probate Judge reject applications presented to him not in accordance with every detail in the instructions when the applicant refuses to comply with the instructions or should he forward the application to the Director of Public Safety for his approval or rejection? If the application is rejected by the Director of Public Safety is it his duty to mail the application back to the original applicant at the address given on the application and advise him of the errors in the application in order that he correct them? (My reason for asking this question is to place the responsibility for rejecting applications on the Director of Public Safety if possible rather than on the Probate Judge).

"6. If the Probate Judge accepts the application and the fee of $1.10 as required and mails the application to the Director of Public Safety and the Director of Public Safety later rejects the application does he make a refund of the money paid by the applicant?

"7. Does a person who now possesses a 1939 drivers license have until November 14, 1939, to make application for the new 1940 license or must all applications be made by October 1, 1939? My reason for asking this question is that I have been informed by certain Highway Patrolmen that they have been instructed to make arrests in certain cases of people who have a 1939 drivers license but who have not made application for a 1940 drivers license by October 1 of this year.

"8. Many people move from place to place, some live in trailers and hotels and get their mail from General Delivery. Must their application be rejected because they have no permanent address?

"I will appreciate it if you will make a careful study of the law in connection with the questions submitted to you and render me your usual prompt opinion in order that we may make every effort possible to cooperate with the Highway Patrol in administering the law."

Before attempting to answer your questions, we deem it advisable to quote certain pertinent provisions of the new Driver's License Law or Highway Patrol Act (Act No. 181, General Acts 1939, p. 300, approved March 18, 1939 and effective September 30, 1939) and to make certain general statements which are pertinent to the questions raised in your letter of inquiry.

Sections 2, 3 and 4 of said Act read, respectively, as follows:

"Section 2. Such person shall apply under oath to the Judge of Probate of the county of his residence for said driver's license or a renewal thereof upon a form which shall be provided by the Director of Public Safety. At the time of filing any such application, the applicant shall pay to the Judge of Probate a fee of $1.10, and the Judge of Probate shall give him a receipt therefor on a form provided by the Director of Public Safety.

"Section 3. At the close of business on Monday of each week when any application has been received or temporary instruction permit hereinafter provided for has been issued, the Judge of Probate receiving such application or issuing such permit shall prepare a report of the same upon a form which shall be provided by the Director of Public Safety. One copy of such report, together with all applications received and copies of all permits issued shall be forwarded to the Director of Public Safety and one copy shall be retained by the Judge of Probate. On the 10th day of every month the Judge of Probate shall prepare a report showing the number of applications received and permits issued and the amount of fees received during the previous calendar month. One copy of such report shall be forwarded to the Director of Public Safety, one to the State Comptroller, one to the State Treasurer, and he shall retain a copy. He shall also at said time deliver to the State Treasurer the amount of all such fees collected less ten cents (10c) for each application received or permit issued, which sum shall be retained by him, and shall be his sole compensation for performing any and all duties required of him under the provisions of this Act. All funds remitted to the State Treasurer under the provisions of this Section shall be kept in a separate fund in the State Treasury to be known as the 'Highway Patrol Fund'.

"Section 4. The Director of Public Safety, upon receipt of applications for licenses from Judges of Probate, shall immediately examine the same and if no legal reason for the denial of the isuance of such license appears the same shall be immediately issued and mailed to the applicant at the address shown on his application upon a form provided by the Director of Public Safety."

Subsection (n) of Section 10 thereof provides:

"(n) Any person denied a license or whose license has been cancelled, suspended or revoked by the Director of Public Safety except where such cancellation or revocation is mandatory under the provisions of this Act shall have the right to file a petition within thirty (30) days thereafter for a hearing on the matter in the County Court, Circuit Court or court of like jurisdiction in the county wherein such person resides, and such court is hereby vested with jurisdiction and it shall be its duty to set the matter for hearing upon thirty (30) days' written notice to the Director of Public Safety, and thereupon to take testimony and examine into the facts of the case and to determine whether the petitioner is entitled to a license or subject to suspension, cancellation, or revocation of license under the provisions of this Act."

Section 14 of the Act reads:

"Section 14. The Director of Public Safety, with the approval of the Governor, shall establish and promulgate reasonable rules and regulations not in conflict with the laws of this State concerning the enforcement of the provisions of this Act."

Section 16 provides:

"Section 16. In the event any driver's license issued under the provisions of this Act is lost or destroyed, the person to whom the same was issued may upon payment of a fee of twenty-five cents (25c) and upon furnishing proof to the Director of Public Safety that the same has been lost or destroyed, secure a duplicate. Application for such duplicate shall be made to the Director of Public Safety on forms provided by him."

I am informed that the application for a driver's license and the instructions contained thereon were prepared in accordance with rules and regulations promulgated in the manner provided by Section 14, supra. It is my further information that the reason for requiring the applications to be filled out either with black ink or a typewriter is so that the same may be easily photostated by the Director of Public Safety. Upon mature reflection, I am of the opinion that Section 14, supra, contains ample authority for the promulgation of these rules and regulations.

Your questions numbered one, two and five are so closely related that they will be answered together. You will note from the above-quoted provisions of said act that the Judge of Probate receives, as compensation for performing the duties required of him under the provisions of the act, ten cents for each application received or permit issued. The duties required of him under the provisions of this act in relation to application for driver's license for which he receives a fee of ten cents each, may be stated as follows: 1. Receiving the application. 2. Giving the applicant a receipt therefor. 3. Forwarding to the Director of Public Safety on Monday of each week a report of the applications received, together with the applications. 4. On the 10th day of each month, preparing a report showing the number of applications received and the amount of fees collected therefor during the preceding calendar month, one copy of which must be forwarded to the Director of Public Safety, one to the State Comptroller, and one to the State Treasurer. 5. At the same time, delivering to the State Treasurer the amount of all such fees collected, less ten cents for each application received.

It can also be seen from the provisions of Section 4, supra, that the duty of determining whether or not an applicant for a driver's license shall be issued a license or whether his application shall be denied devolves upon the Director of Public Safety and not upon the Judge of Probate.

However, I am of the opinion, from a consideration of the whole act, that it is contemplated thereby that the Judge of Probate should require that an application be filled out in accordance with the instructions contained on said application before receiving the same and then performing the other duties in regard thereto which are enumerated hereinabove, for all of which he receives the fee hereinabove noted. When the act provides for a fee of ten cents for each application received as compensation for the performance of the duties required of the Judge of Probate in regard thereto, I think it means that the Judge of Probate is entitled to the fee for each application received which is properly filled out, and that he would not be entitled to a fee for an application not so properly filled out. A consideration of the practical application of this act strengthens this conclusion. If the Judge of Probate requires the application to be filled out in accordance with the instructions for filling out the same contained thereon before receiving the application and collecting the fee therefor, it will be of benefit to the applicant in that it will prevent delay in the matter of his securing his license and save him the trouble of having to fill this application out correctly or making a new application at a later date, it will save an untold amount of trouble and expense for the Director of Public Safety, and will probably also save the Judge of Probate of having to assist the applicant in filling out his application properly or in filling out a new application at a later date.

Your third question has been answered by an opinion of this office rendered to Hon. J. F. Brawner, Director, Drivers License Division, Highway Patrol, Montgomery, Alabama, under date of September 22, 1939, a copy of which opinion is herewith enclosed for your information.

Section 16, supra, is the section making provision for the issuance of a duplicate license in case the license is lost or destroyed, and provides for the payment of a fee of twenty-five cents for the same. When a person makes application for a driver's license and pays the required fee therefor, he is entitled to have the driver's license issued to him unless some legal reason for a denial of the license exists. If the license which is mailed to him by the Director of Public Safety never reaches him, then, in my judgment, it could not be said that the same had ever been issued in the sense that term is used in the act. Certainly, if the license is never received by the person for whom it was intended, it could not be said that the person had lost or destroyed the license and would, therefore, have to pay the fee required by Section 16, supra, before a duplicate license could be issued to him. In my judgment, it is incumbent upon the Director of Public Safety to deliver a driver's license into the hands of the person making the application before a person could be required to pay the fee provided in Section 16, supra, for a duplicate.

However, your attention is called to the fact that application for a duplicate driver's license is made to, and the fee required for the same is paid to, the Director of Public Safety and not to the Judge of Probate.

If a person makes application for a driver's license and pays the required fee therefor, and the Director of Public Safety denies his application and

declines to issue him a license, there is no provision of law for a refund of the money paid by the applicant. It is a well known principle of law that a person cannot secure a refund of monies paid to the State unless the Legislature, as a matter of grace, has given statutory authority to seek a refund. No such statutory authority for a refund has been granted by the Legislature as to the money which a person pays at the time he makes application for a driver's license and his application is later denied. In this connection, however, your attention is directed to the provisions of Subsection (n) of Section 10 quoted hereinabove, which gives to any person who is denied a license the right of a hearing on the matter in the courts of the state.

I am informed by the Director of Public Safety that in accordance with the provisions of Section 14, supra, a rule and regulation has been promulgated giving to persons who now possess a 1939 driver's license until November 14, 1939, to make application for a new driver's license.

While the instructions contained on the application provide that the applicant should give his permanent residence address, if the applicant has no permanent residence address, of course, he cannot give a permanent residence address, and, in such case, he should give his address at the time of making the application for a license, and the Director of Public Safety would not be authorized to reject an application because the person had no permanent residence address.

We believe that the above answers fully your various inquiries, and we trust that it gives you the information in regard thereto which you desire.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 5, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Motor vehicles—

Taxicab licenses may not be purchased on monthly declining basis.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of October 4, 1939, in which you request my opinion as follows:

"I would greatly appreciate your opinion on the following by return mail.

"The Motor Vehicle Law requires that all Tag receipts be printed and supplied by the State Tax Commission. The X-2 Taxi Tag Receipts were printed showing the monthly declining basis and in some cases we sold Taxi tags on this monthly declining basis where they had been operated on a private tag up until the time Taxi tag was sold. Please advise whether or not we were correct in this assumption."

Your inquiry must be answered in the negative. This office in an opinion to Hon. Wm. W. Hill, Probate Judge of Montgomery County, on February 19, 1938, has ruled that "ambulances, hearses, and taxicabs are not taxed on a monthly declining basis." Biennial Report of Attorney General, 1936-38, page 547. Taxicabs must pay the license provided in sub-paragraph (c) of Schedule 158.3, Section 348, Chapter 6, Article 13, of the Revenue Act of 1935. Quarterly Report of Attorney General, Vol. I, page 293.

Trusting this answers your inquiry, I am

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 6, 1939.

Hon. D. F. Byrd,
Treasurer, Dale County,
Ozark, Alabama.

Fees—

Clerk of the Circuit Court of Dale County entitled to commission of five percent on all witness fees which he collects and pays into the County Treasury of Dale County to be credited to the Fine and Forfeiture Fund of said county (Local Acts 1927, p. 70). Claim of said Clerk for said commission is not barred by the limitation imposed by Section 228 of the Code of 1923.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of September 4, 1939, in which you request my opinion as follows:

"I am enclosing to you copy of a letter written to me by Hon. W. A. Brown, Clerk of the Circuit Court of Dale County, which is self explanatory. His claim filed with me covers the period from April 1936 to date.

"On the basis of his letter I request your opinion as to whether the county is liable for the five percent commission claimed by him, and if liable, we presume it is to be paid out of the Fine & Forfeiture Fund."

The letter written to you by Hon. W. A. Brown, Clerk of the Circuit Court of Dale County, to which you refer, is as follows:

"Under sub-section 16 of Section 6724 of the Code of Alabama, 1923, on all moneys collected for the County and remitted to the County Depository or Treasurer, I am allowed a five per cent commission. The Attorney-General's office has held that a County operating under a local law whereby the State Witnesses are paid irrespective of the collection of the witness fees, and when collected said State witness fees are payable into the County Depository or Treasury, that said witness fees are collected for the County and not for the various witnesses, and, therefore, the Circuit Clerk is entitled to the same commission as on solicitor's fee, etc. Local Acts 1927, page 70, provide for the payment of all State Witnesses by Dale County. Consequently, I am herewith enclosing you a statement of State Witness Fees collected by me and remitted to the County, totalling $8,387.41, and from which amount my commission of five per cent was not deducted, and ask that you please draw check payable to me for said commission of $419.37."

In answer to your inquiry, I am of the opinion that the Clerk of the Circuit Court of Dale County is entitled to a commission of 5% of all witness fees which he collects and pays into the depository of Dale County to be credited to the Fine and Forfeiture Fund of said county.

Section 6724(16) of the Code of 1923 provides as follows:

"16. To render to the county treasurer, court of county commissioners, or board of revenue, within thirty days after each term of the court, a statement in writing and under oath, of the fines assessed and forfeitures obtained during such term, the amount of each, and against whom each was assessed or obtained, and also what money they have received for the county, specifying from whom, on what account, and the amount in each case; and, after deducting from such amount five per cent for their compensation, they must pay the balance to whomsoever is custodian of the county funds."

In construing said section with reference to the collection and remission of witness fees, this office, in an opinion rendered to the Judge of Probate of Clarke County on September 27, 1939 (copy of which is enclosed), held that clerks of circuit courts are entitled to 5% commission on witness fees when same are collected and paid into a general or special fund of the county on the theory that the clerk is collecting money for the county, but that he is not entitled to said 5% commission on witness fees when he collects same and pays the money over to the witnesses.

Bearing the above premise in mind, the question presents itself as to whether or not the Clerk of the Circuit Court of Dale County, under the Local Act of 1927, p. 70, is collecting money for the county or collecting same for the witnesses. Said local act provides that the money is paid to the depository of said county and credited to the fine and forfeiture fund of the

county. Said act also provides that witnesses are paid from said fund regardless of whether or not the particular witness fees in the case in which they were witnesses are collected. In my judgment, the Clerk of the Circuit Court of Dale County in collecting and remitting witness fees to the depository of said county to be credited to the fine and forfeiture fund is collecting money for the county within the contemplation of Section 6724(16) of the Code of 1923 and not for the individual witnesses.

The opinion above referred to further held that the claims of circuit clerks for the 5% commission on witness fees collected by them and paid into the county treasury were not barred by the limitation imposed by Section 228 of the Code of 1923. This was on the theory that this was a claim fixed by law and need not be itemized and presented to the county governing body for audit and allowance, and therefore need not be presented within twelve months as required by Section 228 of the Code of 1923.

From the foregoing, it appears that Mr. Brown, based on the facts stated in his letter, is entitled to his commission of $419.37 to be paid from the Fine and Forfeiture Fund.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 6, 1939.

Hon. Grady Gorham,
Clerk, Circuit Court,
Cullman County,
Cullman, Alabama.

When execution is placed in the hands of the sheriff for the purpose of collecting a judgment or judgment for costs, the execution must be returned according to the terms of the same, and the reason for its not being executed or only being executed in part must be stated in the same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 19, 1939, in which you request my opinion as follows:

"We would appreciate an opinion from you as soon as possible on the following:

"It has been the custom in this County for several years for Sheriff's to return civil executions issued out of the Circuit Court and the Circuit in Equity, with the following return endorsed thereon, 'I hereby return the within execution and ask for an alias.' Some of these executions were issued on Judgments dating back for a period of almost five or six years and in some instances the party whom the execution is issued against has sufficient property above whatever exemption he might claim with which to make said execution, and the Sheriff has been holding said execution 90 days and at the end of 90 days returns the executions and asks for another alias execution and when the alias execution is issued he holds it for 90 days and asks for another alias and so on for a period of, in some instances, several years. We would like to know in such cases as outlined above where the party against whom the execution is issued is solvent and no reason assigned by the Sheriff for not making the execution and where the Register or Clerk has already issued in some cases 25 to 30 executions, if the Clerk would be liable for the trial tax, if he refused to issue alias executions in cases of this nature. It does not seem right that the Clerk should be called on to continue issuing executions and never receive any pay in cases where the party to whom the execution is issued against is solvent."

From the statement of facts which you give me, it is my opinion that the return the sheriff makes in these cases is no return. That is, it is not a legal return. The return shows on its face that the sheriff, whether he meant it or not, has not been diligent in his efforts to collect the execution.

I call your attention to Section 7815, Code of Alabama 1928 (Michie), which is as follows:

"7815. Reason for not executing stated.—If the writ is not executed, or only executed in part, the reason why it is not executed, or only executed in part must be stated in the return."

The return which the sheriff is accustomed to making, according to your statement of facts, does not contain any reason for his not executing the writ, and therefore might subject him to summary proceedings.

It is my opinion that you are under no obligation to issue an alias execution until the sheriff has made a correct return to the original execution.

Reid et al. v. Dunklin, 5 Ala. 205;

Caskey v. Haviland, Risley & Co., 13 Ala. 309;

Martin v. Barney, 20 Ala. 369.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 6, 1939.

Hon. Lamar Field,
Associate Judge, Circuit Court,
Talladega County,
Talladega, Alabama.

Probation—Conditions of probation—

1. Inasmuch as trial tax is a part of the public revenue of the state and county, and is not, strictly speaking, an item of cost, circuit judge not authorized to relieve prospective probationer from payment of trial tax, as a condition of probation.

2. Circuit Judge, as a condition of probation, may relieve prospective probationer from payment of solicitor's fees, witness fees, etc.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of September 18, 1939, addressed to Col. William E. Persons, Director, Department of Corrections and Institutions, in which you request my opinion as follows:

"Referring further to the matter of costs in cases in which defendants are put on probation:

"I am requiring payment of costs in all cases in which they have to be paid out of the Convict Fund of the State or the Fine and Forfeiture fund of the county. I am not, however, requiring payment of colicitor's fees, trial tax, defendant's witnesses, or witnesses who are employed on a salary basis by the State or county.

"As to the trial tax, I do not want to be in the attitude of failing to collect it and then to have the Examiners to come along and charge it to the Clerks. I will, therefore, thank you to ask the Attorney General to let you have an opinion as to whether a Judge has the right in these cases to waive payment of the trial tax. I would also like to have your views as to the other items of costs which I am not requiring to be paid."

In my opinion, a circuit judge, in fixing the terms of probation of a prospective probationer, has no authority to waive, and acquit the prospective probationer of the duty to pay, trial tax.

Section 8 of Act No. 278, approved August 24, 1939, relating to probation of persons convicted of crime, provides:

"Section 8. Any provision of law to the contrary notwithstanding allowances, costs and fees of officers of courts and of state witnesses in any cases in which sentence is supended and the defendant put on probation, shall be paid in the same manner and from the same funds or sources as if no suspension of execution of sentence had intervened."

Section 4 of said act provides in part:

"Section 4. CONDITION OF PROBATION. The court shall determine and may at any time modify the conditions of probation and may include among them the following, or any other: That the probationer shall: *** (g) pay the fine imposed, or costs or such portions thereof as the Court may determine, and in such installments as the Court may direct; *** ."

The history of the trial tax provision, and the manner of its enactment into law are strongly persuasive of the conclusion that the trial tax is a 'tax on litigation" rather than, strictly speaking, an "item of cost." It was first enacted as Section 4½ of the Revenue Act of 1919 (General Acts 1919, p. 284). It was amended by Act No. 491, General Acts of 1931, p. 604, which amendment only related to the manner of its distribution as between the state and county. It was re-enacted as Section 9 of the General Revenue Acts of 1935 (General Acts 1935, p. 263).

In **State ex rel Franklin County v. Hester**, 224 Ala. 464, 140 So. 744, the Supreme Court construed the 1931 amendment, noted supra. In that case, Franklin County had demanded of the clerk of the circuit court that he pay one-half of the trial tax collected, less the clerk's commission, into the General Fund of the county. The clerk declined to cover the same into the county treasury because of an alleged constitutional defect in the 1931 amendment, that the same violated Section 70 of the Constitution. In determining that the trial tax statute was in the nature of a revenue raising measure, although not to be measured by Section 70 of the Constitution, the Supreme Court said:

"We think it is clear that the mere fact that a bill proposes to change some features of the Revenue Act with respect to the funds raised under its terms does not make it a 'revenue bill' regulated by the provisions of the Constitution, Section 70."

This office repeatedly has held that the trial tax statute is a revenue measure. Biennial Report of Attorney General, 1930-32, p. 703, and authorities there cited; Biennial Report of Attorney General, 1936-38, p. 369, and authorities there cited; idem p. 690 and authorities there cited.

The Supreme Court of Alabama, so far as we are able to ascertain, has never directly spoken to the exact question of the nature of the trial tax, that is to say, whether it is an item of cost, as such, or a "tax on litigation."

The State of Tennessee had a like provision of law imposing a trial tax on litigation, with the provision that the unsuccessful party should be charged with the tax. In speaking to the question in **Johnson v. State,** 85 Tenn. (1 Pickle) 325, the Tennessee Court said:

"The question presented is whether this tax upon litigation, when imposed upon the party taxed with the cost in a criminal cause, can be collected, as if costs, by imprisonment. This court has frequently held that this is not costs, but is a specific tax for revenue purposes. Fines and costs in criminal causes of the grade of misdemeanors may be collected by confinement in the workhouse or county jail *** . The refusal of his Honor, the criminal judge, to instruct the jailer, as requested, was manifestly based upon the idea that this state and county tax imposed upon the appellant was part of the costs, and that as such must be paid

or secured or worked out as a fine and legal costs. In this, we think he erred. A very able argument has been made by the counsel for the state in support of the action of the lower court in holding this tax to be costs, or at least to be collectible as if costs. This court has frequently held that this tax upon litigation was not costs, but was a specific tax upon litigation, both civil and criminal, imposed solely for revenue purposes. ***

"This tax is in no sense any more costs in a criminal cause than in a civil cause, neither is it imposed by way of punishment in a criminal cause any more than in a civil cause. In the case of State v. Hartman, 5 Lea 118, it was held that when a nolle pross was entered upon condition that defendant pay all costs, that he did not thereby assume this tax, and could not be required to pay it, for the reason that it was no part of the costs which he had agreed to pay. *** If this tax is one imposed for a revenue purpose, and is no part of the costs adjudged, upon what principle can the appellant be imprisoned to compel him to pay or secure it? We know of none. The remedy for its collection is judgment and execution. If that fails, it is simply an uncollectible debt. The legislature have not authorized imprisonment for failure to pay this tax or any other. There is as much authority for attempting to collect this tax by confinement, when imposed in a civil case, as in a criminal cause. It is neither 'fine nor costs' but a tax for revenue purposes. The defendant below cannot be held in confinement for the purpose of enforcing its collection."

In **State v. Davidson County,** 96 Tenn. (12 Pickle) 178, the same court, in speaking to the question of the status of the litigation tax imposed by the Tennessee statutes, said:

"It has been held by this court that the state tax on litigation is no part of the costs of a criminal prosecution, and that a prisoner having paid or tendered the amount of fine and costs was entitled to his release and could not be held to secure or work out the state and county tax. *** The amount paid by the defendant in this case covered the fine and costs, and, having paid that amount, he was entitled to his liberty, notwithstanding the state and county tax was left unpaid."

In **State v. Nance,** 69 Tenn. (1 Lea) 644, the same court again spoke to the question of the status of the Tennessee litigation tax statute:

"The state tax upon litigation imposed by Section 551 of the Code, is in the language of the act 'a specific tax' upon the 'unsuccessful party' to the litigation. It is not a part of the necessary expenses incident to the suit but is imposed by the legislature as a 'specific tax' upon unsuccessful litigants for the purpose of raising revenue for the state. This section is found under Title 5, Chapter 1, treating 'of the revenue of the state' and 'of the sources of public revenue', and in Sections 553 and 553(a), which specify the rates and enumerate the subjects of taxation, are found 'original suits', 'appeals', etc., with 'circuses', 'brokers', 'peddlers', etc.

"The language of Section 3204 shows that the benefits of the act are intended for 'persons' entitled to costs which may have accrued in the progress of the cause and not for the purpose of aiding the state in the

collection of a tax by transferring a liability to the successful party, which, by the express terms of the act imposing the tax is 'a specific tax' payable to the state by the 'unsuccessful party' to the litigation."

See also **Cone v. Donaldson,** 47 Pa. St. (11 Wright) 363; and **Keith Bros. & Co. v. Stiles, 92 Wis. 15.**

In view of the cited opinion of the Supreme Court of Alabama and of former opinions of this office holding that the trial tax statute is a revenue measure, and the decisions upon the exact question here considered from courts of last resort of other states, I am persuaded that the quoted provisions of Section 4 of the probation act do not authorize a circuit judge to relieve a prospective probationer of the duty of paying trial tax, which constitutes a part of the public revenue of the state and of the several counties.

Inasmuch as copies of this opinion will come into the hands of laymen, it may be well, in the interest of clarity, to emphasize that the trial tax here dealt with is that imposed upon the original conviction of crime, and that, in no event, is a trial tax levied or payable in probation proceedings.

As to the other items mentioned in your inquiry, viz., solicitor's fees, defendant's witnesses, etc., it is my opinion that the quoted excerpt from Section 4 of the probation act affords ample authority for the circuit judge to exercise his discretion in each particular case as to whether or not he shall require the prospective probationer to pay them as a condition to probation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 7, 1939.

Hon. W. W. Boswell,
Sheriff, Geneva County,
Geneva, Alabama.

1. Sheriffs summoning witnesses to appear before grand jury are not entitled to pay for such services out of the fine and forfeiture fund of the county in cases where no indictment is found.

2. Clerks issuing subpoenas for witnesses to appear before the grand jury are not entitled to pay for such services out of the fine and forfeiture fund of the county where no indictment is found.

3. Witnesses appearing before grand jury are entitled to their pay out of the fine and forfeiture fund of the county in cases where no indictment is found.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 29, 1939, in which you request my opinion as follows:

> "The question has been raised as to whether proper and legal fees in cases before the Grand Jury in Geneva County, where there is a return of 'No Bill' by the Grand Jury, are properly and legally chargeable against the Fine and Forfeiture Fund of Geneva County.
>
> "I would greatly appreciate a ruling on this question at your earliest convenience as witnesses and officers in Geneva County wish to know whether they can porperly and legally file claims for such fees against the Fine and Forfeiture Fund of Geneva County."

My answer to your request is in the negative in part, that is, as to officers' costs in connection with grand juries. In an opinion of this office written March 4, 1937, to Hon. G. E. Alday, Sheriff, Washington County (Biennial Report of Attorney General, 1936-38, p. 125) this office has held that the sheriff is not entitled to pay out of the fine and forfeiture fund of the county for summoning witnesses to appear before grand jury where no indictment is found. This opinion is based on an opinion of the Supreme Court in the case of **Kilgrow v. Swindle, County Treasurer,** 219 Ala. 378, 122 So. 333, in which the court holds:

> "Construing the several related sections, we conclude the fee of the sheriff for serving subpoenas on witnesses to appear before the grand jury, where no indictment is found, is not a lawful claim against the fine and forfeiture fund."

As to clerk's fees in connection with his duties to the grand jury, I call your attention to an opinion of this office written July 12, 1935, to Hon. F. M. McLane, Clerk of the Circuit Court, Talladega County (Biennial Report of Attorney General 1934-36, p. 220). This opinion holds:

> "Fee of circuit clerk for issuing subpoenas for witnesses to appear before grand jury not payable out of the fine and forfeiture fund of the county in the event no indictment is returned."

This opinion answers your inquiry in holding that the clerk is not entitled to pay out of the fine and forfeiture fund of the county for issuing subpoenas to witnesses to appear before a grand jury where no indictment is returned.

Now we come to a discussion of the pay of witnesses who appear before a grand jury in any particular case in which no indictment is found. Such witnesses are entitled to pay out of the fine and forfeiture fund of the county. I call your attention to an opinion of this office written September 7, 1938, to Hon. S. L. Johnson, Clerk of the Circuit Court, Calhoun County (Biennial Report of Attorney General 1936-38, p. 766). This opinion holds:

"Where a grand jury does not find an indictment the witnesses appearing before the same are entitled to be paid from the fine and forfeiture fund of the county."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

October 7, 1939.

Hon. Thos. A. Peavey,
Judge of Probate,
Escambia County,
Brewton, Alabama.

Taxation—Redemptions—

On redemption from tax sale of lands bid in by the State, interest is not chargeable on costs and officers' fees.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of September 26, 1939, in which you request my opinion as follows:

"In the sale of lands in the State for delinquent taxes, there is included advertising costs, officers' fees and interest on the taxes from date of delinquency to date of sale.

"In order that I may properly and legally compute the amounts required to redeem lands sold to the State for taxes, I request your official opinion as to whether interest from date of sale to date of redemption should be figured only on the **taxes** in the sale or should it be figured on the **total** amount of taxes, **advertising costs, officers' fees** and **interest** for which the land sold.

"If you are of the opinion that I should compute interest on the total amount for which the lands sold, should this interest be distributed to taxes, advertising costs, officers' fees and interest, or should it be distributed only to the taxes?"

In answer to your first inquiry, I am of the opinion that the interest in question is computed only on the amount of the actual taxes due and not on the costs and officers' fees.

Section 269 of the Revenue Act of 1935, as amended by General Acts 1936, p. 30, provides in pertinent part as follows:

" *** (a) In order to obtain the redemption of land from tax sales, where the same has been heretofore or hereafter sold to the State, the party desiring to make such redemption shall deposit with the Judge of Probate of the County in which the land is situated, the amount of money for which the lands were sold, with interest thereon at the legal rate of interest prevailing at the time said property was sold for taxes, together with the amount of all taxes found to be due on such land since the date of sale, as provided herein, with interest thereon at the legal rate of interest prevailing from the maturity of such taxes, and all costs and fees due to officers. *** "

It will be noted from the above that interest is chargeable on "the amount of money for which the lands were sold" and on "the amount of all taxes found to be due on such land since the date of sale." There is no mention of interest in regard to "all costs and fees due officers." Although when lands are sold for taxes the costs and officers' fees are included in the purchase price, yet the "amount of money for which the lands were sold," as used in the above quoted subsection, does not, in my opinion, include "costs and officers' fees." The fact that there is a specific mention of "costs and officers' fees" shows a clear legislative intent that these items should be treated separately on redemption. In this separate treatment there is no reference to interest and none is chargeable in connection therewith.

In regard to the proper computation of interest on redemption from tax sales, I wish to refer you to an opinion of this office found in Biennial Report of Attorney General 1936-38, p. 90, which deals with the subject at length.

In view of the above, an answer to your second inquiry is unnecessary.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 7, 1939.

Hon. Watkins M. Vaughan,
Judge of Probate,
Dallas County,
Selma, Alabama.

Taxation—Assessment to "John Jones, Guardian of Wood heirs" held insufficient since heirs, not guardian, have title to property (Revenue Laws 1935, Section 40).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 26, 1939. in which you request my opinion as follows:

"I am sending you herewith the copy of an assessment of real property by 'E. W. Pettus, Guardian of Woods heirs'.

"Please refer to Section 40 on page 28 of Simons Code and you will find the following: 'Section 40. The property of every minor shall be listed by his guardian, etc. etc.' Further down in said section 40 you will find also the following: ' . . . and all persons herein required to list property for others shall list it separately from their own, and in the name of the owner thereof.'

"Please examine the enclosed copy of assessment and also this section of the Revenue Code and advise me as to whether the assessment by 'E. W. Pettus, Guardian of Woods heirs' is a sufficient designation as required in the latter part of said Code Section above quoted."

In my opinion the assessment "E. W. Pettus, Guardian of Wood heirs" is not a sufficient designation under provision of Section 40 of the 1935 Revenue Laws to which you refer in your inquiry.

You will note that Section 40 provides in part "that the property should be listed in the name of the owner thereof." In the case of **Wilson v. McKleroy,** 206 Ala. 342, 89 So. 584, the Supreme Court of Alabama has held that the legal title to a minor's land is not in his guardian, but in the minor. Again in **Carlyle v. Watts,** 78 Ala. 486, it is stated that "on the death of owner of real estate the title and ownership vest in his heirs subject to the statutory power or personal representative."

This office has many times held, and indeed the statute so provides, that if the person to whom the land is assessed owns the legal title, a compliance is had with the requirements of law and a valid sale may be based on such assessment.

Quarterly Report of Attorney General, Vol. I, p. 61.

Biennial Report of Attorney General, 1928-30, p. 232.

Quarterly Report of Attorney General, Vol. III, p. 202.

Opinion under date of June 24, 1936, to Hon. Chas. W. Lee, State Comptroller.

You are, therefore, advised that the assessment described in your inquiry is an improper one. The proper mode of assessing such property would be as follows: "James Wood and John Wood by E. W. Pettus, Guardian."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 9, 1939.

Hon. Albert S. Towle, Member,
Board of Revenue and Road Commissioners,
Mobile County,
Mobile, Alabama.

Officers—Members of board of revenue, court of county commissioners or other like governing body, and other officers enumerated in Section 5024, Code of Alabama, 1923, as amended by General Acts 1936-37, p. 225, as agents for insurance companies, may write fire, tornado and other kinds of insurance on property owned by their respective counties.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of September 30, 1939, in which you request my opinion as follows:

"Please advise me if your opinion rendered to Honorable W. H. Holcombe, Sheriff of Mobile County, September 5th, 1939 wherein your opinion states 'Officers—Sheriff of County, as agent for an insurance company, may write fire, tornado or casualty insurance on property owned by state, county and other political divisions and subdivisions of the State' apply to Members of the Board of Revenue and Road Commissioners.

"I am a duly elected, qualified and acting Member of the Board of Revenue and Road Commissioners of Mobile County. Prior to assuming my office on November 19th, 1938 and since, I have been engaged in the insurance business, as an agent representing insurance corporations in the under writing of fire, tornado, automobile and all kinds of insurance as well as bonds of all kinds.

"As a member of the Board, I have the privilege of voting for a committee composed of three insurance agents to inspect, value, rate and divide the insurance among the agents in Mobile County. As such would I be prohibited by law from receiving as an agent any fire, tornado or other insurance to be issued and covered by insurance corporations represented by me, the property protected being owned and the premiums to be paid by the County of Mobile. As you know I, of course, will receive a commission as an insurance agent out of the actual premiums charged the policy holder by the company which issues the policy, represented by me."

In answer to your inquiry, it is my opinion that the opinion of this office rendered to Hon. W. H. Holcombe, Sheriff, Mobile County, on September 5, 1939, is applicable to you, as a Member of the Board of Revenue and Road Commissioners of Mobile County.

In my opinion any of the officers enumerated in Section 5024, as amended by General Acts 1936-37, p. 225, as agents for insurance companies, may write

fire, tornado and other kinds of insurance on property owned by the respective counties. The opinion rendered to the sheriff of Mobile County, above referred to, held the sheriff of a county, as agent for an insurance company, may write fire, tornado or casualty insurance for porperty owned by the county. Said opinion is based on a construction of Section 5024 of the Code of 1923, as amended by General Acts 1936-37, p. 225, which is as follows:

> "5024. County officer interested in county contracts.—Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract for work or services of the county, or is employed in any way under such contract, or is interested in any contract for hire of county convicts, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers."

In construing the above quoted section, as amended, said opinion held that since the same was a penal statute it must be strictly construed, and that the terms "any contract for work or services of the county" and "or sells any goods or supplies to the county" did not include contracts for insurance with the county wherein the officer was an agent for the insurance company. Although the opinion was confined to the office of sheriff, it is nevertheless equally applicable to the other officers enumerated in said section, as amended.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 9, 1939.

Hon. M. E. McConnell,
Judge of Probate,
Sumter County,
Livingston, Alabama.

Licenses—Out-of-state bottling company, without a bottling plant in a county in this state, cannot pay the license levied by Schedule 26 of Section 348 of the 1935 Revenue Act and then sell its product at wholesale in the county without the payment of the license levied by Schedule 129 of Section 348 of the 1935 Revenue Act, or any other license levied by said act to which it might be subject.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of October 4, 1939, in which you request my opinion as follows:

> "I would appreciate your usual promptness in advising me about the following:
>
> "A certain Bottling Company in Mississippi comes into this County to sell its product, but intends to establish a plant in this County in a few months. If this company took out a bottler's license at the present time, could it sell its product in this County under this license until its plant has been established here? If it cannot do this, what license would it have to take out?"

Schedule 26 of Section 348 of the 1935 Revenue Act provides, in pertinent part:

> "Schedule 26. Every person producing, bottling and/or distributing in bottles or other closed containers soda water, coca-cola, pepsi-cola, chero-cola, ginger-ale, grape and other fruit juices or imitation thereof, near beer, carbonated or malt or cereal beverages and all light preparations known as soft drinks, shall not use any machine, machines and/or apparatus for the filling or bottling of the same until such person shall have first applied for, paid for and obtained in advance from the Probate Judge a license, the fee for which, for each machine, shall be graded or proportioned as follows: *** (Then follows the license schedule and other provisions not here pertinent)."

Schedule 129 of Section 348 of the 1935 Revenue Act reads:

> "Schedule 129. Each person engaged in the business of selling at wholesale non-alcoholic, carbonated, or other soft drinks, shall pay an annual license of Fifty Dollars ($50.00). **Provided that bottlers who have taken out the bottle license for operating plants in this State shall not be liable under this Schedule, nor shall such bottlers be liable for any county or state license under Schedule 146 hereof, nor as transient vendors or dealers or peddlers."** (Emphasis supplied)

In my judgment, the Legislature in the use of the emphasized language of Schedule 129, supra, did not intend that a person who was not operating a bottling plant in this State could, merely by paying the license for operating such a plant in this State, which is levied by Schedule 26, supra, avoid the payment of the license levied by Schedule 129, supra, and such other licenses as it might be subject to under the provisions of the 1935 Revenue Act. On the contrary, it is my opinion that the Legislature intended to grant this exemption only to persons who actually operate bottling plants in this State and have paid the license levied thereon by Schedule 26, supra.

It might also be observed that the license levied by Schedule 26, supra, is based on the particular size of the plant, and that, therefore, it would be impossible to estimate the amount of the license under said schedule until the plant was actually built. To allow a person, even though he might be acting in good faith, to take out the license required of one engaging in a

particular business, when he is not actually engaging in that business, and thereby avoid the payment of another license or other licenses on the business or businesses in which he is actually engaged, would be to sanction an evasion of our Revenue Laws, which I cannot do. "The law abhors dodgers and will not tolerate subterfuges." **Johnston v. State,** 16 Ala. App. 425, 78 So. 419. "That which is prohibited directly cannot be done indirectly and the law abhors evasions and subterfuges." **In re: Opinions of the Justices,** 225 Ala. 503, 143 So. 904. The premises considered, it is my judgment that the company described in your letter of inquiry could not now pay a bottler's license in your county, where, you state, it intends to establish a bottling plant in a few months, and then sell its product in your county until its plant is established without the payment of the license levied by Schedule 129, supra, and any other license to which it might be subject under the provisions of the 1935 Revenue Act.

I presume that this company sells its product in your county in the usual method of selling such product, i. e., at wholesale from trucks to retailers for resale. On this assumption, you are respectfully referred to an opinion of this office rendered to Hon. L. W. Price, Judge of Probate, Conecuh County, Evergreen, Alabama, under date of June 25, 1938, Quarterly Report of Attorney General, Vol. XI, page 126, Biennial Report of Attorney General, 1936-38, page 668, as to the license or licenses which this company must pay to do business in this manner. That opinion holds as follows:

> "A person engaged in the business of selling at wholesale from trucks to retailers for resale bottled fruit juice drinks, non-alcoholic and non-carbonated, must pay the State license levied by Schedule 129 of Section 348 of the 1935 Revenue Act on wholesale dealers in non-alcoholic, non-carbonated or other soft drinks, and one half of the amount of said license to the county, in each county in which he so engages in business, and must also pay the regular transient dealer's license levied by Schedule 147 of Section 348 of the 1935 Revenue Act of $30.00 to the State in one county and $5.00 to each county in which he so engages in business."

On the question of the license or licenses which this company would have to pay to sell its product in this manner after the erection of a bottling plant in your county, you are referred to an opinion of this office rendered to Hon. William Varner, Judge of Probate, Macon County, Tuskegee, Alabama, under date of March 1, 1939, Quarterly Report of Attorney General, Vol. XIV, page 319.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 9, 1939.

Hon. Walter B. Jones, Director,
Department of Conservation,
Montgomery, Alabama.

States—

Duties heretofore conferred upon the Governor, Secretary of State and Attorney General with respect to the letting and making of special contracts for public printing by Section 2904 of the Code of Alabama, 1923, held transferred to the Department of Finance by the Department of Finance Act of 1939, approved March 7, 1939.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of September 27, 1939, in which you request my opinion as follows:

"On September 9, 1936, the Attorney General of Alabama ruled that the contract for publishing the Alabama Game and Fish News, a monthly publication of the State Department of Conservation, could be awarded under Section 2904 of the Alabama Code of 1923. Section 2904 of the Alabama Code of 1923 gives the Governor, the Attorney General and the Secretary of State discretionary power in the matter of public printing.

"On September 25, 1936, the Governor, the Attorney General and the Secretary of State awarded a contract to the Wetumpka Printing Company of Wetumpka, Alabama, for printing the Alabama Game and Fish News, and a contract to the Service Engraving Company of Montgomery for making plates and cuts. The duration of this contract was two years.

"On September 8, 1938, the Governor, the Attorney General and the Secretary of State awarded another contract for printing the magazine to the Gill Printing Company of Mobile, and for making the plates to the Service Engraving Company of Montgomery. This contract, now in force, will expire **September 30, 1940.**

"With the current contract still having a year to run, the Department of Conservation wishes to expand the Alabama Game and Fish News by increasing the size of the magazine from sixteen pages to thirty-two pages.

"It is my intention to request the Governor, the Attorney General and the Secretary of State to approve an amendment to the existing contract, under authority conferred by Section 2904 of the Alabama Code of 1923, authorizing the Gill Printing Company of Mobile, holders of the current contract, to print the increased number of pages for a price to be approved by the Governor, Attorney General and Secretary of State.

"Please advise me:

"1. If the Governor, the Attorney General and the Secretary of State have authority under Section 2904 of the Alabama Code of 1923, to amend the existing contract.

"2. If the Section 2904 of the Alabama Code of 1923 has been superseded or voided by the Department of Finance Act of 1939, Section 5, Paragraph 6. (House Bill 72, approved March 7, 1939).

"3. If there is any conflict between Section 2904 of the Alabama Code of 1923 and the Department of Finance Act of 1939, Section 5, Paragraph 6, which would prohibit the Governor, the Attorney General and the Secretary of State from amending the existing contract.

"Your prompt consideration of this matter will be appreciated."

The answer to all of your questions depends upon a determination of whether or not the duties heretofore placed upon the Governor, Secretary of State and Attorney General in regard to the letting and making of special contracts for public printing by Section 2904 of the Code of Alabama, 1923, have been transferred to the Department of Finance by the Department of Finance Act of 1939, approved March 7, 1939.

In my judgment, this question must be answered in the affirmative, i. e., these duties have been so transferred.

Section 2904 of the Code of Alabama, 1923, reads, as follows:

"Section 2904. Special contracts for public printing let and made by governor, secretary of state and attorney-general.—The governor, secretary of state and the attorney-general of the state may let and make special contracts with any person, firm or corporation for any public printing or binding which they may deem necessary and proper for the use of the state or any department thereof. Such special contracts may be let at public or private bidding, as in the judgment of the governor, secretary of state and attorney-general will best serve the interest of the state or the department of the state for the use of which the special contract is so let or made."

The provisions of the Department of Finance Act of 1939 pertinent to this inquiry are hereinbelow set out in the order in which the same appear in the act:

"Section 5. FUNCTIONS AND DUTIES OF THE DEPARTMENT OF FINANCE. The general functions and duties of the Department of Finance shall be as follows: *** (6) To manage, supervise and control all printing and binding for the state and for each department, board, bureau, commission, agency, office and institution thereof and the distribution of all printed matter and to make and supervise the execution of all contracts with respect thereto, except as may be otherwise required by the Constitution. *** ."

"Section 6. TRANSFER OF FUNCTIONS AND DUTIES OF OTHER STATE DEPARTMENTS AND AGENCIES TO THE DEPARMENT OF FINANCE. All functions and duties heretofore assigned by law to any department, board, bureau, commission, agency or office of the State but assigned by this Act to the Department of Finance shall be performed by the Department of Finance; and each such department, board, bureau, commission, agency or office is hereby relieved of such functions

and duties, and the following sections which provide for specific transfers of certain functions and duties to the Department of Finance are not intended to limit the generality of the foregoing provision, it being the intention of the Legislature in enacting this Act to bring together all such functions and duties in the Department of Finance for purposes of efficiency and economy."

"Section 23. THE DIVISION OF PURCHASES AND STORES; THE PURCHASING AGENT. There is hereby established in the Department of Finance the Division of Purchases and Stores, which shall be headed by and be under the direction, supervision and control of an officer, who shall be designated the Purchasing Agent, to be appointed by the Director of Finance, with the approval of the Governor. The functions and duties of the Division of Purchases and Stores shall be as follows: *** (7) To perform all functions and duties of the Department of Finance with respect to printing and binding and the distribution of printed matter and also the distribution of school text-books purchased or contracted for by the State. *** "

Since the Department of Finance Act of 1939 is the last expression of legislative will on this subject, it is my opinion that the above quoted provisions of said act supersede the provisions of Section 2904 of the Code of Alabama, 1923, supra, and that the duties heretofore vested in the Governor, Secretary of State and Attorney General in regard to the letting and making of special contracts for public printing by said section are now transferred to and vested in the Department of Finance to be exercised through the Division of Purchases and Stores, and the officer in charge thereof, the Purchasing Agent.

The premises considered, you are advised that the Governor, Secretary of State and the Attorney General do not now have authority to amend the contract referred to in your letter of inquiry, and that the matter of amending this contract should be taken up with the Purchasing Agent who is the officer in charge of the Division of Purchases and Stores of the Department of Finance.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 10, 1939.

Hon. Hubert McCarley, Member,
County Board of Education,
Marion County,
Bexar, Alabama.

1. Member of the Board of Education of Marion County, who, while serving as such member, accepts a position outside of the county, does not forfeit his place on said Board on account of this

temporary absence from the county, since he still retains his residence in Marion County in the district in which he was elected and his family still resides there while he is away.

2. A Member of the Board of Education elected under the local act for Marion County approved March 31, 1936, General and Local Acts 1936, p. 38, who moves out of the district in which he was elected to another and different district in the county, vacates his membership on said Board.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 25, 1939, in which you request my opinion as follows:

"The Legislature of 1935 passed a local act for Marion County dividing the County in five districts for the purpose of electing members to the County Board of Education. I was elected from District 1 in 1938. I have recently been appointed to a position in the Convict Camp located near Cullman, Alabama. My home is in the District for which I was elected and my family still lives in the home.

"Can I legally retain my membership as member of the Board while working in the Convict Camp at Cullman? It is my purpose to attend all County Board Meetings while my work is at Cullman. I am serving County Board District No. one. If I move from my District into another District can I retain my membership on the Board?"

I find that you are mistaken as to the bill providing for the election of Members of the Board of Education of Marion County. You say it was passed as a local bill in 1935, when, in fact, it was passed and approved on March 31, 1936, General and Local Acts 1936, p. 38.

Your first inquiry is: "Can I legally retain my membership as Member of the Board while working in the Convict Camp at Cullman? It is my purpose to attend all County Board Meetings while my work is in Cullman." I note you say that you are employed in a convict Camp in Cullman but that you retain your residence in Marion County and that your family will remain in Marion County in the same school district in which you were elected as a Member of the Board of Education. I gather from your statement that in attending on your duties in connection with the Convict Department you are just temporarily away from your home. This being true, it is my opinion that you do not forfeit your membership on the Board of Education of your county.

As to your second inquiry, which is: "If I move from my district to another district can I retain my membership on the Board?", my answer is in the negative. In this connection I call your attention to Section 1 of the act creating the Board of Education of your county, which says, in part:

"The Board of Education of Marion County shall be composed of five members, one of whom shall be a resident of each of the subdivisions of the county hereinafter designated and described."

Section 2697 of the Code of Alabama, 1923, provides in part as follows:

"Section 2697. How offices are vacated.—Any office in this State is vacated—

"3. By ceasing to be a resident of the state, or of the division, district, circuit, or county, for which he was elected or appointed."

Since members of the County Board of Education of Marion County are elected from individual districts, they vacate their offices under the provisions of the above quoted section when they move from the district from which they were elected.

See **Baker v. Conway,** 214 Ala. 356, 108 So. 18.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 10, 1939.

Hon. Oakley W. Melton, Judge,
Inferior Court of Elmore County,
Wetumpka, Alabama.

Court of County Commissioners of Elmore County authorized to furnish Judge of Inferior of said county with typewriters.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated October 5, 1939, which follows:

"By a local act of the Legislature of 1935 there was established for Elmore County a County Inferior Court, which act is found in Local Acts of 1935, at page 24. Under the terms of Section 23 of said act the county has provided an office for me as Judge of the said court in the town of Wetumpka but outside of the Courthouse. I conduct some private practice in said office in addition to my services as Judge of the said court.

"Please advise me if I, as Judge of the said court, under the conditions as outlined and under the terms and intent of the said local act, am entitled to have said office furnished with a typewriter by the county and at its expense, the county being willing to do so if it is legal."

The Inferior Court of Elmore County was created and established by Act No. 90, H. B. 387, approved May 29, 1935. Section 23 of said Act is as follows:

"Section 23. The Judge of said court shall keep an office in the Court House of said County, or in such other suitable place in Elmore County as the Court of County Commissioners may provide; and it shall be the duty of the said Court of County Commissioners to provide such office for said Judge, and to furnish and supply the same with the necessary fixtures, stationery, stamps, telephone, lights, heat, etc.; and it shall be the duty of the said Court of County Commissioners and they are hereby directed and authorized to supply the Clerk of the said Court the necessary minute books, dockets, blank forms, record books and such other books, records and blank forms as are reasonably necessary to the dispatch of the business of the said court."

It will be noted from the above quoted section that it is the duty of the Court of County Commissioners of Elmore County to provide an office for the Judge of the Inferior Court of said County and also to furnish and supply the same with the necessary fixtures, stationery, stamps, telephone, lights, heat, etc.

The Supreme Court of Alabama in the case of **Underwood Typewriter Company v. Marengo County Bank,** 203 Ala. 128, 82 So. 158, held that typewriters were included in the term "stationery." Therefore, under the authority of Section 23, supra, it is my opinion that the Court of County Commissioners of Elmore County can legally furnish the office of the Judge of the Inferior Court of said county with a typewriter.

Compare the following opinions of Attorney General:

Biennial Report 1928-30, page 222;

Biennial Report 1936-38, page 13.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 10, 1939.

Hon. Haygood Paterson, Commissioner,
Department of Agriculture & Industries,
Montgomery, Alabama.

Department of Agriculture & Industries—

Enforcement of Acts of 1936, p. 222, concerning the regulation of the business of buying livestock for resale and the business of transporting such livestock along the public highways—

1. Fines imposed for violation of Acts 1936, p. 222, relative to engaging in the business of buying livestock for resale and transporting livestock along public highways, are not coverable into the Agricultural Fund.

2. County license inspectors have authority to cite delinquents for failure to procure license required by Acts 1936, p. 222.

3. Upon collection of the license, the same should be covered into the Agricultural Fund; but license inspectors are not authorized to collect penalties from delinquents.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of September 25, 1939, in which you request my opinion as follows:

"Your attention is invited to Sections 484, 485 and 486 of the Agricultural Code of 1927, also to the Hare Act, a copy of which is enclosed.

"Your opinion is requested on the following points:

"1. Should fines for violation of the Hare Act be remitted to this Department to the credit of the Agricultural Fund?

"2. Should delinquent fees for permits required by the Hare Act be turned over to license inspectors in the various counties for collection as provided in Sections 485 and 486 of the Agricultural Code?

"3. In the event of collections of such fees and penalties under the Hare Act, should they be remitted to the Commissioner for the benefit of the Agricultural Fund?

"Certain amendments to the Agricultural Code were adopted by the Legislature of 1935 which may be found in the Acts of 1935.

"Your opinion is requested so that we may know how to proceed after the beginning of the next fiscal year."

In my opinion, your first inquiry must be answered in the negative.

The Hare Act—Act No. 190, Extra Session 1936, p. 222—is designed to regulate, by licensing, persons, firms and corporations engaging in the business of buying cattle, sheep, hogs, etc. or in the business of transporting or hauling such animals along the public highways. Section 2 thereof levies a license for dealers in such occupations, but the prime purpose of the license levy is for regulation rather than for revenue. The act specifically provides that the license fee shall be paid to the Commissioner of Agriculture & Industries and shall be placed to the credit of the Agricultural Fund of the Department of Agriculture & Industries.

Section 7 of said act provides as follows:

"Section 7. Any person violating any provisions of this Act shall be guilty of a misdemeanor and must on conviction be fined not more than Five Hundred ($500.00) Dollars and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six (6) months."

No provision is made in the act for covering the fines imposed thereunder into the Agricultural Fund. It is, therefore, governed by the provisions of law applicable generally, that is to say, Section 4038 of the Code of Alabama, 1923, which provides:

"Section 4038. Fines to go to county, and judgment accordingly.—All fines and forfeitures shall be paid in money, and shall go to the county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; and judgment therefor must be entered in favor of the state, for the use of the particular county."

Answering your second inquiry, it is my opinion that delinquents in the payment of the fees provided for by the Hare Act, supra, should be called to the attention of the license inspectors of the several counties of the State to the end that collection may be enforced.

Section 485 of the Agricultural Code of 1927 provides:

"485. Lincense Inspector.—When the license inspector, or person charged with the duties relative to collecting delinquent licenses under the general revenue law of the State, ascertains that any person has failed or refused, for thirty days after a fee or license prescribed by this Code has become due, to pay the same, he shall report the same in writing to the judge of probate, who shall forthwith cite such delinqeunt to appear before him and show cause why he has not paid such license or fee."

It applies only to those fees or licenses levied by the Agricultural Code.

However, Section 353 of the Revenue Act of 1935 imposes duties upon license inspectors and provides that:

"If it shall be reported to any license inspector or come to his knowledge that any person, persons, firms or corporations have failed or refused to take out license for a business or occupation for which a license is required by the State *** the license inspector shall thereupon cite such delinquent to appear before the license inspector at the courthouse of the county in which such citation is issued and show cause why the license or privilege tax required by law has not been paid, and at the same time shall file with the probate judge of the county a copy of such citation showing service on the delinquent."

Licenses are imposed for two purposes, viz: revenue and regulation. **City Council of Montgomery v. Kelly,** 142 Ala. 552, 38 So. 67; **State v. Kartus,** 230 Ala. 352, 162 So. 533. **Quarterly Report of Attorney General, Vol. XI, p. 82.**

Although the license imposed by the Hare Act patently is for regulation it is nevertheless a "license required by the State" within the meaning of the quoted excerpt of Section 353 of the Revenue Act of 1935, supra.

Answering your third question, in my opinion the license fee collected by license inspectors from delinquents should be covered by them into the Agricultural Fund. However, no penalties are provided in the Hare Act, and in the absence of such provision for penalties none can be imposed.

It is true that Section 485 of the Agricultural Code provides for the license inspector to cite delinquents who are required **under the provisions of the Agricultural Code of 1927** to procure licenses and permits and pay fees therefor; and that Section 486 of said Code provides for penalties imposed upon delinquents, and which must be covered into the Agricultural Fund when collected. But these Agricultural Code sections apply only to licenses and permit fees required under the Agricultural Code. They have no application to the license fee required by the Hare Act.

It is also true that the Revenue Act of 1935, Section 353(b) requires the Probate Judge to collect citation fee and penalties, but this requirement is limited by Subsection (c) thereof as follows:

> "Where any license issuable by the Probate Judge or Commissioner of License shall be delinquent, the same shall be subject to a penalty of 15 per cent of the amount of the license, which penalty must be collected by the Probate Judge or Commissioner of Licenses when the license is taken out together with interest at 6% from the date of delinquency."

So that there are no provisions of law for the collection of a penalty for failure to pay the license fee or permit fee required under the Hare Act.

The amendments to the Agricultural Code contained in the Acts of 1935 are not material to any question here under consideration.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 10, 1939.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Tax Assessors and Tax Collectors—Commissions—

For purpose of determining amount of commissions to Tax Assessor and Tax Collector, the one-half mill levy for County Health Department and one and one-half mill levy for Road and Bridge Sinking Fund, levied under Act No. 309 (General Acts 1931, page 346), held general, not special taxes.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 26, 1939, in which you request my opinion as follows:

"Please refer to Section 215 of the Constitution of 1901, Section 161 of Revenue Act of 1935 (General Acts 1935, page 335), Section 22 of Revenue Act of 1935 (General Acts 1935, page 272), and the following:

" 'State of Alabama Court of County Commissioners .....
..... County ..... date

" 'At this a regular term meeting and session of the Court of County Commissioners of ..... County, Alabama, which Court met according to law and pursuant to adjournment on the Second Monday and ..... day of ....., at the regular time and place at the County Courthouse in the City of ....., Alabama, within said County, with all members of said Court present as follows:

..... Judge of Probate Present
..... Com. District No. 1 Present
..... Com. District No. 2 Present
..... Com. District No. 3 Present
..... Com. District No. 4 Present

" 'Thereupon said Court proceeded lawfully and regularly to business and unanimously (except as hereinafter shown) made, adopted, and ordered entered the following orders, contracts, and proceedings of said Court and of said County, all done in open Court and public session as follows, to-wit:

ORDER NO. 1 (County Tax Levy)

" 'Ordered and agreed by the Court of County Commissioners of ..... County, Alabama, on this the Second Monday and ..... day of ....., as follows:

"'First. This being the term and time for making the County Tax Levy for the ensuing year, therefore, said Court and County does hereby make the Tax Levy for said County for the year ....., and the rate of taxation is hereby levied and fixed and there is hereby ordered levied for the ensuing year on all the taxable property within said County as assessed for State and County taxation all of the ad valorem County Taxes and rates thereof as hereinafter set out and shown. That the tax rate of said County under the Constitution is Seven and One-half (7½) Mills on the Dollars per annum, all of which is hereby levied and ordered collected and said total tax rate is hereby divided and levied according to law, and all the Local Laws and General laws on the subject and said total tax rate is composed of the General County Tax of Five Mills on the Dollar per annum, and the Special County Tax of Two and One-half (2½) Mills on the Dollar as authorized by the Constitution, and said County Tax Levy is divided and levied under said Local laws and General Laws, including General Act No. 309, found on page 346, of the General Acts of 1931, the population of ..... County being under said last named law ..... inhabitants.

Tax Levy No. 1 (General Fund)

"'First: Three (3) Mills on the Dollar (30c on the One Hundred Dollars) on all the taxable property within said County is hereby levied and ordered levied and collected on all the taxable property in said County for the purpose of defraying the annual County current governmental expenses named and specified under Section 231 of the Code of 1923, and for the payment of all other lawful County expenses and lawful County claims and County warrants allowed, drawn on, and made payable out of the County General Fund. The estimated Revenues from this tax is about ..... dollars per annum and said sum and all proceeds of said tax are hereby appropriated for the payment of all lawful County warrants heretofore drawn or which may hereafter be drawn and made payable out of the County General Fund.

Tax Levy No. 2 (County Health Department)

"'Second: One-half (½) Mill on the Dollar (5c on the One Hundred Dollars) on all the taxable property within said County, is hereby ordered levied and collected for the use of the County Health Officer, County Health Unit and the State and County Health Department and Health Officers, and the proceeds of which tax shall be used exclusively for public health work in ..... County, Alabama, and said proceeds shall be paid over by the County Tax Collector, when collected into the County Depository, as required by law.

Tax Levy No. 3 (County Debts)

"'Third: Four (4) Mills on the Dollar (40c on each One Hundred Dollars) on all the taxable property in said County is hereby levied and ordered levied and collected on all the taxable porperty within said County for the following lawful purposes, namely:

" 'For the payment of all County Road & Bridge debts, and for Building debts, County Courthouse and Jail Buildings, and for the construction and repairs thereof, including said County debts and on the order, and according to priority hereinafter named, to-wit: (a) For the payment of all County Bonded Debt and interest thereon. (b) For the payment of all interest bearing loans and temporary loan certificates. (c) For the payment of all County interest bearing refunding warrants, and interest thereon. (d) For the payment of all other interest bearing obligations of said County. (e) For the payment of all County obligations drawn on and made payable out of the County Sinking Fund and Road and Bridge Fund. (f) For the payment of all rents, furniture, fixtures and improvements which may be due by said County for the use and operation of County buildings as authorized by law. (g) For the payment of all valid County warrants, debts and claims allowed and drawn on the County Road and Bridge and Sinking Fund.

" 'The estimated Revenues from this tax is about ..... Dollars per annum, more or less, and said sum and proceeds of said tax are hereby appropriated for the payment of said County debts and obligations set out and shown and according to the priority, rank and order, named.

" 'That all of said foregoing County taxes are ordered levied and collected pursuant to and in accordance with the Constitution and Laws of Alabama.'

"and advise me as follows:

"1. Would the Tax Assessor and Collector be entitled to commissions on that part of the Five Mill tax; namely, One-half of One Mill and One and One-half Mills ordered paid into the Health Fund and the Road and Bridge and Sinking Fund respectively, on the sliding scale as provided by sections allowing commissions on taxes for general purposes, or would they be allowed a flat two per cent on such amounts as provided in sections allowing commissions for special taxes levied and collected, taking into consideration the fact that this levy is made as provided by the Constitution; namely, Five Mill for General County purposes and Two and One-half for Special purposes?"

In my opinion, the Tax Assessor and Tax Collector, under the facts stated in your inquiry, would be entitled to receive commissions on the sliding scale provided in Sections 22 (as amended by Act No. 326, General Acts, 1939, approved August 31, 1939) and 161 (as amended by Act No. 325, General Acts, 1939, approved August 31, 1939) of the Revenue Laws of 1935, on assessments and collections made of the one-half mill and one and one-half mills ordered paid into the Health Fund and the Road and Bridge Sinking Fund respectively. The Tax Assessor and Tax Collector should be allowed a flat two per cent on the two and one-half mills special tax which forms a part of "Tax Levy No. 3" set out in your inquiry, as provided by the sections allowing commissions for special taxes (Sections 22 and 161, supra).

The seven and one-half mill levy made by the Court of County Commissioners is authorized by Section 215 of the Constitution of Alabama of 1901, which provides as follows:

"No county in this State shall be authorized to levy a greater rate of taxation, in any one year, on the value of the taxable property therein, than one-half of one per centum; provided, that to pay debts existing on the sixth day of December, eighteen hundred and seventy-five, an additional rate of one-fourth of one per centum may be levied and collected, which shall be appropriated exclusively to the payment of such debts and the interest thereon; provided further, that to pay any debt or liability now existing against any county, incurred for the erection, construction or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges or roads, any county may levy and collect such special taxes, not to exceed one-fourth of one per centum, as may have been or may hereafter be authorized by law, which taxes, so levied and collected, shall be applied exclusively to the purposes for which the same were so levied and collected."

You will note from the foregoing provisions that the county is authorized to levy only a five mill general tax and a two and one-half mill special tax for the purposes mentioned in Section 215. Any additional levy of special taxes for the purposes mentioned in Section 215 would be clearly violative of such section. By Act No. 309 (General Acts, 1931, p. 346) the Legislature has authorized the county governing bodies of the counties specified to devote a portion of such five mill general levy and one-half mill special levy to such general or special purposes as the county sees fit to provide. In an opinion rendered by this office under date of August 5, 1931, to Hon. J. N. Baker, State Health Officer, (Opinions of Attorney General, Office Edition Vol. 5, page 180) this office held a similar act (Act No. 255, H. 598 (Local Acts 1931, p. 114)) constitutional, stating inter alia:

"The Legislature has a right to require that a portion of the five mill tax which a county may be authorized to levy be devoted to the uses mentioned in Section 1 of the Local Act in question."

This local act required the Board of Revenue of Conecuh County to levy a special tax of one-twentieth of one per cent on all taxable property in said county and authorized the Board to levy an additional special tax to be used for public health work in the county. The opinion to Dr. Baker concludes:

"The effect of the act was to devote one-half mill out of the five mills mentioned in Section 215 of the Constitution to public health work and to make it discretionary with the Board as to whether an additional one-half mill out of that five mills should be levied for that particular purpose."

It will be seen, therefore, that while the levy made by the Court of County Commissioners in the present case is termed a levy of a special tax, yet to all intents and purposes the Act of 1931 upon which the resolution was based, and the resolution itself merely authorizes the distribution of the five mill tax among certain special purposes. Legislative authority is essential to enable the Court of County Commissioners to make application of the funds of the county and the whole scope of the act in question, and of the resolution based thereon, is to authorize the creation of special funds which must be applied to certain public uses and purposes. See **State v. Street,** 117 Ala. 203, 23 So. 807.

You are, therefore, advised that the Tax Collector and Tax Assessor are entitled to collect their commissions on the sliding scale provided for in Sections 161 and 22, as amended, respectively, of the 1935 Revenue Laws on the three mill levy set forth in "Tax Levy No. 1", on the one-half mill levy in "Tax Levy No. 2" and on the one and one-half mills of the four mill levy in "Tax Levy No. 3", in the quoted resolution, these levies being of general and not "special taxes" within the meaning of the laws providing for commissions of Tax Assessors and Tax Collectors.

The Tax Assessor and Tax Collector would be entitled, however, to two per cent commission on two and one-half mills levied and collected under "Tax Levy No. 3" inasmuch as this levy is of "special taxes".

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 10, 1939.

Hon. Elmer L. Vinson,
Tax Collector,
Limestone County,
Athens, Alabama.

Taxation—Tax Collector—

Tax collector held authorized to levy on personal property of non-resident when said property is found within the county, to satisfy taxes on real estate located in the county.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your request for official opinion under date of August 8, 1939, which follows:

"One of our delinquent taxpayers gave me a check for his taxes the day before the list was published the first time for the tax sale. Naturally I did not have his property advertised, thinking that his check was good, but within a week his check was returned to me not paid.

"This man owns a farm in this county, but he lives in Tennessee. He does not assess any personal property in this county. Could I levy on any personal property he might bring to Alabama just temporarily? He comes to Athens in his automobile, and I would like to know if it would be all right for me to levy on it.

"He sent me a Post Office Money Order for $50.00 and told me he would come and pay the balance, but he failed to come when he said

he would. Can I advertise and sell his real estate for the tax and cost, less this $50.00 which he sent me?"

The tender of a check in payment of taxes, which said check is dishonored, is, in fact, no payment. **Wadsworth v. State,** 225 Ala. 118, 142 So. 529, and cases therein cited.

I wish to refer you to Section 170 of the Revenue Law of 1935 (General Acts 1935, p. 339) which provides as follows:

"Section 170. After the first day of January of each year, the Tax Collector must proceed, without delay, to levy upon the personal property of delinquent taxpayers for the payment of their taxes, and after having first given ten days' notice of the time and place of sale, with a description of the property to be sold, by posting the same at three or more public places in the precinct of the residence of such delinquent, either at the time of assessment or of the levy, or if he is a non-resident of the county, in the precinct in which the levy is made, he must sell the same, or so much thereof as may be necessary to satisfy the taxes, fees and expenses of sale, including the expenses of keeping the property and moving the same to the place of sale in front of the courthouse of the county, or at the voting place, or at the residence of such delinquent, or at any other place in the precinct in which such notice was posted, at public outcry to the highest bidder for cash, and the property so sold shall not be subject to redemption. For making such sale, the collector shall be allowed a fee of one dollar, to be collected out of the property. Such taxpayer may, at any time before the sale, pay the taxes, interest, fees and expenses, including the collector's fees for the sale, the same as if it had been made, and thereby discharge the levy."

I wish to further refer you to Section 177 of the Revenue Law of 1935 (General Acts 1935, p. 341), which is as follows:

"When no personal property can be found out of which the taxes of any delinquent taxpayer can be collected, or an amount insufficient to fully satisfy such taxes, the real estate of such taxpayer, or the real estate upon which such taxes are a lien, shall be sold for the payment thereof, or of the balance due thereon, in the manner hereinafter prescribed. But the failure of the tax collector to so exhaust such personal property shall not invalidate the sale of any real estate."

You will observe that the above quoted sections permit the tax collector to levy on any personal property within the county for the taxes due, and upon failure to find such property or to make the taxes from the sale of such property, then process against the realty of the delinquent taxpayer is authorized. I wish to further refer you to an opinion of the Attorney General reported in Biennial Report of Attorney General 1932-34, p. 582.

Under your statement of facts, I note that a payment of $50.00 was made upon the taxes due, leaving an uncollected balance. Of course, you understand that the taxpayer must have credit for the $50.00 paid.

Premises considered, it is my opinion that you may levy upon the named automobile when within the county, and if the sale of the said automobile fails to satisfy the lien for taxes, you may advertise and sell the realty in question, giving credit to the taxpayer for the $50.00 paid.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 11, 1939.

Hon. S. P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Deed filing tax required to be paid on assignment of oil and gas lease when same is offered for record.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion date October 6, 1939 which follows:

"Enclosed is copy of Assignment of Oil and Gas Lease.

"Please advise if there should be charged on these assignments a Deed Tax since a tax was charged at the time the original Lease was filed for record.

"State Examiners are now auditing my office and I will appreciate a prompt reply as they are almost finished with their examination. This being merely an assignment of a mineral lease and is not referred to in opinion to this office in Biennial Report of 1934-36 at Page 202."

It is my opinion that when an assignment of an oil and gas lease is offered for record, a deed tax should be paid on the same, based on the value of the interest conveyed, as the assignment is as much a conveyance of interest as the original oil and gas lease.

In an opinion of this office under date of May 23, 1938 reported in Biennial Report of Attorney General 1936-38, page 622, this office held that an oil and gas lease was subject to a deed filing tax based on the value of the interest conveyed by said lease and that the amount to be paid on said lease was left to the Probate Judge.

This office, in an opinion to you under date of July 5, 1935, Biennial Report Attorney General 1934-36, page 202, held that a deed filing tax was required on an assignment of a lease. This opinion construing Section 21½ of Act 163 of the Acts of 1927 (General Acts 1927, page 163) which section was brought forward in haec verba in the 1935 Acts as Schedule as Schedule 46 which provides in part as follows:

"Schedule 46. Deeds, bills of sale, etc. No deed, bill of sale or other instrument of like character which conveys any real or personal property within this state, or which conveys any interest in any such property, except the transfer of mortgages on real or personal property within this state upon which the mortgage tax has been paid, deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate, and deeds and other instruments or conveyances, executed prior to October 1, 1923, shall not be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record to-wit: *** "

It is, therefore, my opinion that where an assignment of an oil and gas lease is offered for record, a deed filing tax should be paid on the same based on the value of the interest conveyed.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 11, 1939.

Hon. A. H. Collins,
State Superintendent of Education,
Department of Education,
Montgomery, Alabama.

Education—Courses in Bible and religion can be taught, as electives, in the public schools of the State provided the courses do not stress any particular sect, creed or denomination but embrace a study of the Bible or religion from a historical, narrative, biographical and literary standpoint. However, before credit toward graduation can be given for such courses the same must be placed upon the approved elective course list by the State Department of Education and must be conducted by a certificated teacher.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion of September 14, 1939, as follows:

"I have a letter from Superintendent B. B. Baker, Fairfield City Schools, in which he states that it is the desire of the Fairfield city

board of education to have the Bible taught in the Fairfield city schools on a non-sectarian basis. He has asked me to secure an opinion from you as to the legality of the plan set forth below:

"1. It is proposed that a teacher be placed in the Fairfield Schools to teach Bible on the non-sectarian basis, said teacher's salary to be paid by the churches of Fairfield and not from public funds.

"2. The subject, Bible, would be taught in the junior and senior high schools as an elective and would receive minor credit toward graduation.

"3. The board of education would furnish a room in which the classes would be conducted.

"4. Specifically, is the teaching of religion permissible in the public schools?

"5. Is the teaching of the Bible permissible in the public schools?

"6. Is the use of public school buildings for the teaching of religion or the Bible permissible?

"7. Can credit be given for classes in religion or in Bible in the public schools toward graduation, (a) if the teacher holds a state certificate, (b) if the teacher does not hold a state certificate?

"It may be that some of the points raised above duplicate others raised. However, the whole point in our inquiry is whether or not the churches may employ a teacher to teach Bible on the elective basis in our schools."

Before answering the specific questions propounded in your inquiry, I will endeavor to review the law upon which the answers to these specific inquiries depend.

The Acts creating the Mississippi and Alabama Territory provided that the people of such Territory "shall be entitled to and enjoy all and singular the rights, privileges and advantages granted to the people of the United States northwest of the River Ohio." Article 3 of the Great Ordinance of 1787 which provided for the Territory northwest of the Ohio River, provides as follows:

"Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

It will be seen from the above that prior to the time that Alabama became a state in the Union, the people living in the Territory which later made up the State of Alabama were guaranteed schools for the purpose of inculcating the principles of religion, morality and knowledge. A careful study reveals that this state, from its inception, has fostered public schools,

deeming the education of its citizens essential to their own happiness and welfare, to the peace and prosperity of the nation, and to an intelligent participation in the government of a republic and a proper exercise of the right of suffrage. However, it has been the great aim of various constitutional conventions in this and sister states to keep church and State forever separate as distinct institutions. The Constitutional Convention of 1901, which prepared the present Constitution of the State of Alabama, incorporated therein the following provisions:

Article I, Section 3:

> "That no religion shall be established by law; that no preference shall be given by law to any religious sect, society, denomination, or mode of worship; that no one shall be compelled by law to attend any place of worship; nor to pay any tithes, taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or ministry; that no religious test shall be required as a qualification to any office or public trust under this state; and that the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles."

Article XIV, Section 263:

> "No money raised for the support of the public schools, shall be appropriated to or used for the support of any sectarian or denominational school."

The question is immediately presented as to whether or not the above sections of our Constitution prohibit the teaching, as an elective, of courses in Bible and religion, either or both, in our public schools. This question has never been passed upon by the Appellate Courts of this State but has been the subject of much litigation in sister states.

The Attorney General of Alabama, however, has heretofore been called upon to answer questions which involved a discussion and interpretation of the constitutional provisions with which we are here confronted. In an opinion addressed to Hon. Chas. E. McCall, Chief Examiner of Accounts, **Biennial Report of Attorney General** 1924-26, page 196, it was held that the Act of September 26, 1919 (Section 626, etc. School Code of 1924) was constitutional. The first section of said Act is as follows:

> "All schools in this state that are supported in whole or in part by public funds shall have, once every school day, readings from the Holy Bible."

The above section, supra, was attacked as being violative of Sections 3 and 263 of the Constitution, supra, but the Attorney General in holding that said section, supra, was constitutional made the following observations:

> "The primary purpose of such constitutional provisions is not to abolish the Bible and religion from the public institutions of the State. If so, the law-making body of the State would be compelled to abandon the long established custom of opening its sessions with prayer and chaplains would have to be withdrawn from the penitentiary. Those

constitutional provisions are intended to keep separate church and state, to prevent the ecclesiastical from using civil authority to coerce men into acceptance of their peculiar doctrines, and to prevent a person's civil rights from being affected by his religious views.

"It has been held that the King James translation of the Bible is not a sectarian book and that the reading of passages therefrom in the public schools does not violate the spirit of the constitutional provisions similar to those contained in the Constitution of Alabama, to which reference has heretofore been made.

"Hackett v. Brooksville Graded School District, 117 Am. St. Rep. 599, 120 Ky. 608, 87 S. W. 792.

Texas E. H. Church et al. v. W. L. Bullock et al, 16 L. R. A. (N. S.) 860, 109 S. W. 115.

Pfeiffer v. Board of Education, 118 Mich. 560, 42 L. R. A. 536, 477 N. W. 250.

Billard v. Board of Education, 69 Kan. 53, 66 L. R. A. 166, 105 Am. St. Rep. 148, 76 Pac. 422.

Donahoe v. Richards, 35 Me. 379, 61 Am. Dec. 256.

Moore v. Monroe, 64 Iowa 367, 52 Am. Rep. 444, 20 N. W. 475.

Spiller v. Woburn, 12 Allen. 127.

North v. University of Illinois, 137 Ill. 296, 27 N. E. 54."

and further:

"Its literary value is universally acknowledged. An American would be poorly educated indeed who did not have some familiarity with the exalted teachings of the Bible and its moral precepts. It was not intended that this book, because accepted by thousands as the inspired word of God, and because many find in it the assurance of a better life, should be excluded from the public schools of the State."

From the above, it will be seen that this office has heretofore held that there are no inhibitions in our Constitution against the reading of the Bible in our public schools and has elected to follow the weight of authority in this country which is to the effect that the King James version of the Bible is not sectarian. It was further held that it was not the primary purpose of the Constitution to abolish the Bible and religion from the public institutions of this State.

Looking to sister states, we find that one of the leading cases in support of the reading of the Bible and the holding of devotional services in the public schools is the case of **Hackett v. Brooksville Graded School District etc., 120 Ky. 608, 87 S. W. 792.** This was a suit brought against the trustees and teachers of a school, seeking an injunction against the use of the English translation of the Bible known as the "King James" version and to prevent

the teachers from opening the school with prayers or songs alleged to be of a denominational character. The constitutional provision and statute considered in the case are as follows:

> "No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of any church, sectarian or denominational school." (Sec. 189 Const.)
>
> "No books or other publications of a sectarian, infidel or immoral character, shall be used or distributed in any common school, nor shall any sectarian, infidel or immoral doctrine be taught therein." (Sec. 4368 Ky. State, 1903.)

The Supreme Court in denying the injunction said:

> "The great aim was to keep church and state forever separate as distinct institutions; to prevent the government of one form from assuming rightful control of the government of the other. **Nor is it clear that it was intended to keep religion out of the school, though it is apparent that one aim, at least, was to keep the 'church' out."**

It was further held that a prayer said by the students was not "sectarian" nor was the "King James" version of the Bible "sectarian" within the meaning of the above quoted constitutional and statutory provisions.

In Minnesota, the Supreme Court in the case of **Kaplan v. Independent School Dist. of Virginia et al.,** 214 N. W. 18, held that the furnishing of each school room with a "King James" version of the Bible and the reading of the same by the teacher did not violate any constitutional provisions found in the Constitution of that State. In said case Mr. Justice Holt delivered the opinion of the Court, and in rejecting the reasoning laid down in the case of **State ex rel. Dearle v. Frazier et al.,** 102 Wash. 369, 173 Pac. 35 (which case will hereinafter be considered) and which is probably the leading case in support of the proposition that courses in Bible and religion cannot be taught in the public schools, said:

> "We are not concerned with nice distinctions between sects, nor as to how among them the different authorized versions of the Bible are regarded. We take notice that they are at variance. But we do feel that the intolerance which drove so many to seek an asylum in America has gradually abated and is not now so intense. This intolerance touching religion, the Bible, or certain scientific lines of study is not confined to the Christian or to the orthodox Jew, but it seems to grip the atheist and the disbeliever as intensely. Speaking for myself only, I think that instead of fostering this spirit of intolerance by a strained construction of the Constitution so as to exclude from use by public schools of any book proclaiming great moral precepts, it is more desirable that a liberal construction be adopted to the end that even in the public school the pupils perceive that there is that in our principles of government which recognizes the religious element of man and guarantees protection to its free exercise and culture, and that divergent views of others concerning religion and worship should be tolerated and respected so long as there is no effort made to teach or induce any pupil to adopt them."

In the case of **Donahoe v. Richards,** 38 Me. 398, the following statement is made by the court:

> " 'The common schools are not for the purpose of instruction in the theological doctrines of any religion or of any sect. The state regards no one sect as superior to any other, and no theological views as peculiarly entitled to precedence. It is no part of the duty of the instructor to give theological instruction, and, if the peculiar tenet of any particular sect were so taught, it would furnish a well-grounded cause of complaint on the part of those who entertained different or opposite religious sentiments. But the instruction here given is not in fact, and is not alleged to have been, in articles of faith. No theological doctrines were taught. The creed of no sect was affirmed or denied. The truth or falsehood of the book in which the scholars are required to read was not asserted. No interference, by way of instruction, with the views of the scholars, whether derived from parental or sacerdotal authority, is shown. The Bible was used merely as a book in which instruction in reading was given. But reading the Bible is no more an interference with religious belief than would reading the mythology of Greece or Rome be regarded as interfering with religious belief or affirming the pagan creeds. A chapter in the Koran might be read, yet it would not be an affirmation of the truth of Mohammedanism, or an interference with religious faith. The Bible was used merely as a reading book, and for the information contained in it, as the Koran might be, and not for religious instruction. If suitable for that, it was suitable for the purpose for which it was selected. No one was required to believe, or punish for disbelief, either in its inspiration or want of inspiration, or in the fidelity of the translation or its inaccuracy, or in any set of doctrines deducible or not deducible thereform.' "

As heretofore noted, the case of **Dearle v. Frazier,** supra, is the leading case in support of the proposition that courses in Bible and religion cannot be taught in public schools. The facts upon which the opinion in this case was rendered are very similar to those presented by your inquiry with the exception that the teacher was to be paid from public funds. In arriving at the conclusion that Bible and religion could not be offered to public school students, as an elective, and credit given therefor, the Supreme Court of Washington relied solely on the constitutional inhibitions which were found in the Constitution of that State. The two constitutional provisions most strongly relied upon by the Court are as follows:

> "All schools maintained or supported wholly or in part by public funds shall be forever free from sectarian control or influence." Const. Art. 9, Sec. 4.

> "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment." Const., Art. 1, Sec. 11.

However, a reading of **State ex rel. Dearle v. Frazier,** supra, reveals that in the final analysis the Court's objection to religious instruction in the public schools was based on Article I, Section 11 of the Constitution, supra. This section of the Washington Constitution clearly prohibits the expenditure of public funds for religious instruction and as heretofore noted, the teacher was to be paid from public funds. However, in the opinion is found the following statement:

"There are many cases in the books upon the questions herein discussed, but **none of them have reference to a constitutional provision exactly like our own.** They are collected in the several series of selected cases. Pfeiffer v. Board of Education of Detroit, 42 L. R. A. 536; Church v. Bullock, 16 L. R. A. (N. S.) 860; State ex rel. Weiss v. District Board of School Dist. No. 8, 7 L. R. A. 330; County of Cook v. Industrial Schools for Girls, 8 Am. St. 386, 414; People ex rel. Ring v. Board of Education, 19 Ann. Cas. 220; 35 Cyc. 1127.

"The following cases, however, support our views: State ex rel. Weiss v. District Board of School District No. 8, 76 Wis. 177, 44 N. W. 967, 20 Am. St. 41, 7 L. R. A. 330; People ex rel. Ring v. Board of Education of District 24, 245 Ill. 334, 92 N. E. 251, 19 Ann. Cas. 220, 29 L. R. A. (N. S.) 442."

From the above quoted excerpt, it will be seen that the Supreme Court of Washington recognized that the inhibitions contained in its Constitution were very different from those found in the Constitutions of many sister states. Certainly from a reading of the Alabama Constitution and especially Sections 3 and 263, supra, it can be seen that it contains no such inhibitions as found in the Constitution of the State of Washington. The only inhibitions in our Constitution are against the appropriating of public school funds for the support of any denominational or sectarian schools, or the requiring of the payment of tithes, taxes or other rate for building or repairing any place of worship, or for maintaining any minister or ministry. Under no stretch of the imagination, can we conceive that the foregoing inhibitions found in our Constitution could be interpreted as prohibiting the teaching of Bible or religion in our public schools as elective courses. Such an interpretation upon our Constitution would be a strained one and certainly contrary to the principles upon which this State was founded and upon which it has existed.

Therefore, it is my opinion, based upon the former ruling of this office, and supported by the reasoning found in the cases herein cited, that elective courses in Bible and religion may be offered in the public schools of this State **provided the courses do not stress any particular sect, creed or denomination but embrace a study of the Bible or religion from a historical, narrative, biographical and literary standpoint.**

However, I would like at this time to call attention to the fact that although the teaching of the Bible and religion, as heretofore considered, is permissible in the public schools, yet the determination as to whether such courses will be recognized and credit given therefor lies within the State Department of Education. Without citing the various and numerous sections of the School Code of 1927 and other applicable statutes, I find from a study of the same that the Course of Study Committee which is selected by the Superintendent of Education and who in turn is a member of said Committee, selects the required subjects which must be given in order for one to graduate from elementary, junior and senior high schools. This Committee also lists a group of elective courses which may be given in the public schools together with the amount of credit given each course. The report made by this Course of Study Committee is then submitted to the Department of Education for approval. Under this system, the County and City Superintendents and Boards of Education must provide the required courses as determined by the State Department of Education in the various schools and can select from the approved elective group the courses which they desire.

It can, therefore, be seen that until courses in Bible and religion are approved and placed upon the elective course group by the State Department of Education as required by law, no credit can be given toward the required number of units for graduation.

Therefore, answering the specific questions propounded by you.

Questions 1, 2 and 3 require no answer.

Questions 4, 5 and 6 are answered in the affirmative.

Question 7 is answered in the affirmative, subject to conditions set out in opinion.

7 (a). Certification of all teachers in public schools is required by Section 339 of the School Code of 1927.

7 (b). No credit can be given unless the teacher complies with Section 339 of the School Code of 1927.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 11, 1939.

Hon. Powell Hamner,
Sheriff, Walker County,
Jasper, Alabama.

Where a defendant who is arrested on an indictment charging felony, makes bond and forfeits the same and is rearrested in an adjoining or another county in the State, and returned and convicted for the offense, the forfeiture against the defendant and bail being set aside by the court, the removal bill of the defendant is payable by the State.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 26, 1939, in which you request my opinion as follows:

"Please furnish me with the following opinion. The statement of record hereto attached shows the disposition of the case of Jim Uptain charged with distilling.

"I removed the defendant from Hamilton, Marion County, Alabama, jail to Jasper, Alabama, Walker County Jail. Who is liable for the removal bill, the bondsmen or the State?"

The statement which you enclose is as follows:

"State of Alabama,
vs. Charge: Distilling.
Jim Uptain

"The case being set for trial August 2nd, 1939 and on August 2nd continued to August 7th, 1939. On August 7th, continued to August 11th, 1939, the defendant not appearing on August 11th, for trial the judge order a forfeiture and alias warrant for the defendant's arrest and on August 11th, the clerk issued an alias warrant and the defendant was arrested on August 26th, 1939.

"On August 29th, 1939, the defendant entered a plea of guilty for distilling and was sentenced for two years in the penitentiary, and on the same date the judge set the forfeiture aside.

"State of Alabama,
Walker County,

"I, Minus H. Johnson, Clerk in and for said State and County hereby certify that the above is true and correct as same appears of record in this office.

"This Sept. 22nd, 1939.

Minus H. Johnson

Clerk of the Circuit Court."

As I gather from your statement of facts accompanying your inquiry, the forfeiture in this case was set aside by the court, and as you do not mention it, I presume it was set aside without imposing any terms such as the payment of the costs of forfeiture, etc. Since no such terms were imposed, there is no liability on the sureties of the bond, as the defendant's appearance bond was only a guarantee of his appearance, and, if a forfeiture was taken on the same and later set aside without the imposing of terms, then when the defendant was brought into court and tried the terms of the bond were fully met.

I call your attention to Section 3741, Code of Alabama, 1923, where it says, in part:

" *** For removing any prisoner upon a change of venue granted in his case, or who is arrested on a warrant issued by a justice of the peace, or on an indictment, and confined in a county other than that in which he is triable or arrested for contempt, or as a defaulting witness, three dollars for contempt, or as a defaulting witness, three dollars for himself or his deputy acting in his stead, and two dollars for each guard for each

day they are respectively engaged in such removal, together with the actual necessary traveling expenses of himself or deputy, and guard or guards, and prisoner or prisoners, while on the trip, by the nearest route usually traveled between the points from and to which such removal is made, to be paid by the state in case of felonies, and by the county when the offense committed is a misdemeanor; *** "

The charge here against the defendant being a felony, the expense of his removal is paid by the State.—Biennial Report of Attorney General 1928-30, page 20.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 11, 1939.

Hon. H. E. Kendrick,
Tax Collector,
Dallas County,
Selma, Alabama.

Homestead exemptions—

Procedure to be followed where Tax Assessor fails to allow homestead exemption where taxpayer legally entitled to same.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 26, 1939, in which you request my opinion as follows:

"Please give me at your earliest convenience your opinion on the following case.

"Tax Assessor failed to allow homestead exemption to taxpayer who was legally entitled to same (Tax Assessor agrees).

"What are the duties of the Tax Collector in such cases when the taxpayer is ready to pay his tax and asks for his homestead exemption?"

The facts detailed in your inquiry do not clearly indicate the circumstances surrounding the error of the Tax Assessor in failing to allow the homestead exemption to the taxpayer in question. For the purpose of your inquiry, therefore, I am assuming that the homestead exemptioner asserted his claim therefore, for failing therein he waived the tax gratuity. **(Quarterly Report of Attorney General, Vol. IX, page 10.)**

I am also assuming that the return was listed and the claim was filed on the forms prescribed by the State Tax Commission (now the Department of Revenue) as noted in an opinion rendered by this office under date of November 29, 1938, to Hon. Hunter Phillips, Tax Assessor, Choctaw County. **Quarterly Report of Attorney General,** Vol. XIII, page 87.

If the failure of the Tax Assessor was due to an error of judgment on the legal question of whether or not the taxpayer was entitled to the exemption, you have no other authority than to collect the items shown by the abstract certified to you by the Assessor under the provisions of Section 178 of the Revenue Act of 1935. It is primarily the duty of the Tax Assessor to grant and allows exemptions claimed by the taxpayer, (**Quarterly Report of Attorney General,** Vol. XI, page 117), and under the provisions of Section 178 of the Revenue Act of 1935 authorizing the Tax Collector to report such persons as have been over assessed or wrongfully assessed, the Tax Collector has authority only to report and have allowed amounts which, by virtue of clerical errors, are greater than the amount of taxes actually due, and he is not empowered to reopen and revalue property. **Quarterly Report of Attorney General,** Vol. IV, page 95. Also see **Quarterly Report of Attorney General,** Vol. I, page 143; Office Edition, Vol. 17, page 158, and Vol. 2-A, Office Edition, page 6, all of which reach the conclusion that the Tax Collector is required to collect the items shown by the abstract certified by the Assessor, except as to apparent clerical errors.

Another feature which is involved is the question of whether the error was dicovered before or after the close of the tax year. If before, this office has held that the Department of Revenue may proceed under Section 93 of the Revenue Act of 1935 to revise the assessment and adjust any error. **Quarterly Report of Attorney General,** Vol. XI, page 117. However, if the tax year is closed, the only course of procedure left open to the taxpayer in the event the error of the Tax Assessor was other than clerical, would be to pay the taxes under protest and apply for a refund of the excess (the amount allowed by homestead exemption erroneously disallowed) pursuant to the authority contained in Section 296 of the General Revenue Act of 1935 in the manner described in the opinion found in Quarterly Report of Attorney General, Vol. X, page 18.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 11, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

1. Justices of the Peace—Costs and Fees—

(1) Subsection 2 of Section 3850 of the Code of 1923 held to authorize justice of the peace to deduct not exceeding $50.00 for each calendar month from fines and forfeitures collected during that month.

(2) Section 3850, Subsection 2 of the Code of 1923 held not to authorize a cumulative deduction of $300.00 for justice of the peace for each six-month period required by this section to be reported on.

(3) The words "any calendar month" held to confine the collection of costs by the said justice of the peace and constable to fines and forfeitures accruing in said court in each calendar month.

2. Highway Code—Fines and forfeitures imposed for violations of the Highway Code held payable directly to the State Treasurer except in cities. Justices of the peace and constable held not authorized to deduct fees from fines and forfeitures collected for violations of Highway Laws.

3. Executions—Justice of the peace held not authorized to collect fees, as provided for by Section 3850, Subsection 2, Code of 1923, without issuance of execution and return "no property found" against convicted defendants.

4. Justice of the Peace—Costs—Execution may be issued by justice of the peace for costs accrued on case tried in his court as long as judgment rendered thereon is in full force and effect.

5. Execution may not issue for costs of the justice of the peace court until a valid judgment is rendered therefor.

6. Justices of the Peace—Judgments—Justice of the peace held authorized to amend bench entry or written judgment nunc pro tunc up to the time he adjourns his court, but not thereafter.

7. Sheriffs—Constables—Word "constable", as used in Section 3850, Subsection 2, Code of 1923, held not to include sheriff.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of August 30, 1939, in which you request my opinion as follows:

"Will you please give me your official ruling on the following questions:

"1. Refer to Section 3850, Subsection 2, and advise me on the following:

"(1) Is the Justice of the Peace entitled to collect not exceeding $50.00 for each calendar month?

"(2) Is he entitled to collect $300.00 for each six month period required by this section to be reported upon?

"(3) Do the words 'any calendar' month confine the collection of cost by the said officers to fines and forfeitures accruing in said court in each calendar month, or for the entire term of office?

"2. In cases of violations of the highway laws when the defendants are acquitted, or when the defendant is proven insolvent by execution returned 'No Property Found', may Justices of the Peace collect their costs as provided by Section 3850, Subsection 2, supra?

"3. May the Justice of the Peace legally collect fees from the $50.00 deduction provided for by Section 3850, Subsection 2, without the return of execution 'No Property Found' against the defendant?

"4. Within what period of time must a Justice of the Peace issue execution in order to collect his costs?

"5. Is a judgment for costs necessary before the execution may issue for such costs.

"6. May a Justice of the Peace amend his bench entry or written judgment, nunc pro tunc, and if so, how long after rendition of judgment may he amend such judgment or bench entry?

"7. When the word 'constable' is used in Section 3850, Subsection 2, may the Sheriff perform these services and be paid according to the schedule fees set out for the Sheriff, from the $50.00 deductible by the provisions of Section 3850, Subsection 2, supra?"

1. In reply, I wish to advise you that your question numbered one with its three subsections are so interrelated that I have elected to answer the same as a whole. Subsection 2 of Section 3850 of the Code of 1923 provides as follows:

"2. To collect all fines imposed where the defendant is not sentenced to jail or hard labor to pay same; or an appeal is taken. He may deduct from fines and forfeitures collected by him, the amount due for his fees and those of the constable in cases in which the defendant was acquitted, or insolvent and unable to pay after conviction, a sum not to exceed fifty dollars for any calendar month; he shall pay the remainder of the fines and forfeitures collected by him to the treasurer or to the custodian of the county funds where there is no county treasurer, same to be paid semi-annually on the first Mondays in January and July of each year, and make his report at the next session of the grand jury; if he should fail to make such payments as herein provided, he shall forfeit all rights to make any deduction from his collections for cost due him and the constable for fees as herein provided."

I wish to call your attention to the following clause which demands construction here:

"He may deduct from fines and forfeitures collected by him the amount due for his fees and those of the constable in cases in which the defendant was acquitted or insolvent and unable to pay after conviction, a sum not to exceed fifty dollars for any calendar month; *** "

You will note that the sum deductible by the justice of the peace during any calendar month is limited to $50.00. A calendar month, in my judgment, means exactly what it says—the months of the year as reckoned by the Gregorian Calendar. A rule of statutory construction prevents a strained construction upon a passage whose language and meaning are clear. **Dixie Coaches v. Pete Ramsden,** 190 So. 92 (Advance Sheet). In the case of **Culver et al. v. Sparkman,** 149 So. 877, the court, speaking to this question, said:

"There is no merit in the contention that this suit was prematurely brought. Under section 4 of the local act, supra, the plaintiff as constable was under duty to execute and make due return of all processes issued out of said court. For this service he was entitled to his legal fees, to be collected in the same manner as provided by law for like services in justice courts. Under Code 1923, Section 3850 (2), it was the duty of the judge to collect the fees imposed and apply same to the payment of his costs and the costs of the constable, not to exceed $50 for any calendar month, the remainder to be paid to the county. Until the fees of the judge and constable had been paid to the amount named in the statute, the county had no interest in said fines so collected. Under Code 1923, Section 3850, the judge may deduct from fines and forfeitures collected by him the amount due for his fees and those of his constable in cases in which the defendant was acquitted. When this is done, the amount of the constable's fees were immediately due him. The evidence sustains the finding by the jury that these fines were collected in the amount of the verdict rendered, that the amounts were appropriated to the payment of costs due plaintiff in cases in which the inferior court had jurisdiction, and that the amounts had not been paid."

The county has no interest in the fines collected until the fees of the justice of the peace and the constable are deducted as provided, supra. See **Culver et al. v. Sparkman,** supra. These fees are deductible by the calendar month and the balances over and above $50.00 in each or any calendar month as such deductions become authorized, immediately accrue to and become the property of the county. Some doubt has been expressed concerning the use of the word **"any"** in the above quoted statute. In my judgment, the legislative intent unfolds after a careful consideration of the entire statute, quoted supra, as such construction is guided by the language of the decision of the Court of Appeals, above quoted. It is my opinion that the provisions above quoted limit the amount deductible to an extent not to exceed $50.00 in any one calendar month. This amount may possibly be less than $50.00, but cannot exceed $50.00 deduction within the time limit set by law of a calendar month. It may be seen that in one month the fines collected may amount to a sum less than $50.00, but such deficiency cannot be made up by a deduction greater in amount than $50.00 in a subsequent month.

It is true that the statute requires a report to be made in January and July with a remittance of the balance due to the county. A further report must be made to the grand jury, as directed in the statute quoted, supra, upon the pain of losing all deductions which would otherwise be allowed. These provisions, in my judgment, do not authorize a semi-annual deduction of fees to average $50.00 per month, and in no manner limit the express pro-

vision that such deduction shall not exceed an amount greater than $50.00 in any calendar month. But one construction is available—the deduction is to be made from the collections made during the month such deduction is taken and may not exceed $50.00 during any such month. There is no provision to authorize the payment of $300.00 in January and July nor to allow the authorized deductions to accumulate.

2. In my judgment, your question numbered two must be answered in the negative. I wish to refer you to the General Acts of 1927, page 390, to Section 106 of the Highway Code, which provides as follows:

> "Section 106. FINES AND FORFEITURES. All fines and forfeitures collected upon conviction or upon forfeiture of bail of any person charged with a violation of any of the provisions of this Article constituting a misdemeanor, shall be within thirty days after such fine, or forfeiture is collected forwarded to the State Treasurer. All amounts received from such fines or forfeitures shall be credited to the funds of the State Highway Department, for the maintenance of Roads and Bridges. Failure, refusal or neglect to comply with the provisions of this section shall constitute misconduct in office and shall be ground for removal therefrom. Provided that all fines and forfeitures collected by Recorders Courts or other municipal courts for violation of ordinances, in cities and towns of over two thousand population according to the last or any subsequent census, whether for acts constituting violations of the provisions of this article or not, shall be paid into the Treasury of such municipality in which the same was collected."

You will note that the provisions of this section clearly and definitely command that all amounts received from such fines or forfeitures shall be, within thirty days after collection forwarded to the State Treasurer and there credited to the funds of the State Highway Department. These particular funds have been jealously guarded by the statutes against their being applied to the payment of officers' fees of any nature whatsoever.

I wish to call your attention to Section 11, Subsections (f) and (g) of H. B. 245—Hill, approved March 18, 1939, which provide as follows:

> "(f) All fines, penalties or forfeitures imposed under the provisions of this Act shall be forwarded immediately upon the collection of the same by the officer of the court who collects the same to the Director of Public Safety, together with a report giving a list and description of each case in which a fine, penalty or forfeiture was collected. Such reports shall be on forms provided by the Director of Public Safety and shall contain such information as the Director of Public Safety may require. **All such moneys received by the Director of Public Safety shall be covered by him immediately upon receipt into the State Treasury to the credit of the Highway Patrol Fund.** (g) Any Justice of the Peace or Notary Public ex-officio Justice of Peace who fails to make the reports provided for in the preceding subsections, or who fails to remit any fines, penalties or forfeitures collected under the provisions of this Act in the manner provided in said subsection, shall be guilty of a misdemeanor and upon conviction shall be fined not more than One Hundred Dollars ($100.00)." (Emphasis ours)

You will note that these provisions next above quoted further indicate a legislative intent to prevent payment of any fees for any officer from the

fines, penalties or forfeitures collected for violations of any Highway Law. While the above quoted law does not affect fees of justices of the peace and constables, it does, at the same time, indicate a legislative intent to preserve inviolate all funds arising from fines and penalties imposed for the violations of the Highway Laws for the purpose of preserving the highways themselves and better enabling the enforcement of the law upon these highways.

I wish to further refer you to the case of **State v. Town of Springville,** 125 So. 387, in which the court said:

> "Without Section 106, all fines collected for the violation of the criminal features of the act would go into the county fine and forfeiture fund. Section 4038, Code. Instead of going to the county, it is provided in Section 106 of the Highway Act that the fines for its violation go to the State Treasurer. There would be no confusion at all as to the meaning of Section 106, but for the proviso, which expressly reserves to cities of over two thousand population fines derived from violations of city ordinances."

This office has heretofore ruled on this question. I refer you to Vol. XIV, Quarterly Report of Attorney General, p. 63.

3. In my opinion, execution must be issued in each case where costs are assessed against a defendant upon conviction, and the insolvency of the defendant so proved before the justice of the peace may deduct fees, as provided for by Section 3850, Subsection 2 of the Code, supra. You will note that this section provides in part as follows:

> "He may deduct from fines and forfeitures collected by him, the amount due for his fees and those of the constable **in cases in which the defendant was acquitted or insolvent and unable to pay after conviction,** *** " (Emphasis supplied)

The method for determining insolvency in Alabama is by execution issued and returned "no property found."

I wish to further refer you to Section 3754 of the Code of 1923, which provides as follows:

> "3754. Same; how taxed and collected.—In prosecutions before a justice of the peace where the case is not taken to the circuit court by appeal, or otherwise, the fees above specified, for such services as may be rendered in the case, must, unless otherwise provided, be taxed by him as costs, and collected by execution, as in cases tried in the county court; and, in all other cases, must be certified by him to the court to which the proceedings are removed, or to which the process is returnable, and there taxed and collected like other costs."

4. In answer to your fourth inquiry, I wish to advise that, in my opinion, a Justice of the Peace may issue executions on a judgment obtained in his court for the purpose of collecting court costs, at any time while the judgment is in full force and effect. However, I call your attention to Code Sections 8749 and 8750 of the Code of 1923, and point out that the provisions

of these two sections must be complied with, in order to keep judgments of Justices of the Peace Courts in full force and effect.

5. Your fifth inquiry must be answered in the affirmative. See opinion rendered to Hon. B. P. Singleton, March 15, 1939, Vol. XIV, Quarterly Report of Attorney General, page 186.

6. In reply to your sixth inquiry, I wish to advise that a Justice of the Peace may amend his judgment or bench entry nunc pro tunc at any time, up to the time of adjournment of his court. After a Justice of the Peace adjourns his court, he loses all jurisdiction over a cause and cannot thereafter amend or alter his judgments. **Rowe v. Arrington,** 1 Ala. App. 633, 56 So. 8; **McCarty v. Smith,** 16 Ala. App. 387, 77 So. 967.

7. In my opinion, your seventh inquiry must be answered in the negative. It is true that Section 10199 of the Code authorizes sheriffs to execute all mesne and final process which is required to be served by constables. But this provision is not authority for the payment of the fees of the sheriff out of the Justice of the Peace Insolvent Cost Fund provided by Section 3850 (2) of the Code of 1923. Said section specifically limits the payment of insolvent costs from said fund to the Justice of the Peace and to the Constable. There is no authority of law for the payment of the fees of the sheriff accruing on account of services in connection with Justice of the Peace Courts from said Justice of Peace Insolvent Cost Fund.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 13, 1939.

Hon. W. W. Boswell,
Sheriff, Geneva County,
Geneva, Alabama.

Cost in Forfeiture of Bail Bond—

Where the bail bond in a criminal case has been forfeited and the forfeiture is set aside on final hearing by the court, the costs of such forfeiture cannot be paid by the county out of its general fund or its fine and forfeiture fund.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 29, 1939, in which you request my opinion as follows:

"In forfeiture cases where the judgment has been set aside, a charge against the Fine and Forfeiture Fund, or, is it to be paid out of the General Funds of the County?

"It seems to me that this is in the nature of a civil suit and should be paid by the county out of the General Fund. I understand in other counties these claims are paid out of the General Fund. Please give me an opinion on this."

My answer to both of your inquiries is in the negative. This office has held that a forfeiture proceeding is a civil process. This being true this cost should not be paid out of the fine and forfeiture fund as this fund cannot be applied in strictly civil proceedings. **State for the use of Coosa County v. Parker,** 83 Ala. 269, 3 So. 552; **Dover v. State,** 45 Ala. 244; Quarterly Report of Attorney General, Vol. XV, p. 212; Quarterly Report of Attorney General, Vol. XV, p. 298. The case of **Coosa County v. Parker,** supra, held that the proceedings on forfeitures were civil proceedings, and that where the forfeiture was set aside altogether by the court the costs were payable by the county, which meant, of course, out of the general fund. But in the more recent case of **Copeland v. Jefferson County,** 192 Ala. 12, 68 So. 285, in which case the court discussed the cases of **Coosa County v. Parker,** supra, and **Dover v. State,** supra, a contrary conclusion was reached. While the court in the case of **Copeland v. Jefferson County** does not in direct terms overrule the case of **Coosa County v. Parker,** supra, and the case of **Dover v. State,** supra, the holding of the court cannot be construed otherwise than as a complete overruling of these cases. It holds that the county cannot be made responsible for the costs in forfeiture cases.

Therefore, I am of the opinion that these costs cannot be charged to the county so as to make them payable either out of the general fund or out of the fine and forfeiture fund of your county.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 17, 1939.

Hon. W. L. Coker,
Tax Assessor,
Talladega County,
Talladega, Alabama.

Tax Assessor—Tax Collector—

Tax Assessor and Tax Collector are required to assess and collect the ad valorem taxes on motor vehicles due all incorporated municipalities of more than 100 inhabitants by virtue of Schedule 158.12(d) of Section 348 of the Revenue Act of 1935.

Municipal Corporation—Municipal Corporation cannot, by passage of ordinance, relieve Tax Assessor and Tax Collector of duty imposed upon them under Schedule 158.12(d), of Section 348 of the Revenue Act of 1935, of assessing and collecting ad valorem taxes due

municipal corporation if such tax has been levied. However, Tax Assessors and Tax Collectors are under no duty to assess and collect municipal ad valorem tax on motor vehicles when municipality fails to levy the tax or repeal a levy for succeeding years.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion under date of August 29, 1939, which follows:

"Will you kindly advise me as follows:

"1. If the Tax Assessor is required to assess, and the Tax Collector is required to collect, the ad valorem tax on automobiles located within the corporate limits of all Municipalities in this County, whether such municipality has a population of 2,000 or less?

"2. In the event that you hold the tax should be assessed and collected, if the Municipality shall pass an ordinance relieving the Assessor and Collector from this obligation, would this be sufficient to relieve the Assessor and Collector from this obligation?

"For your information, we have some three or four industries in this County who have incorporated their villages for their own protection and convenience, but who do not levy or assess any of the inhabitants of their villages with any tax of any kind, and who do not care to have the inhabitants of such villages assessed on automobiles."

In reply to your first inquiry, I wish to advise that this office has ruled that it is incumbent upon the Tax Assessor and Tax Collector to assess and collect all ad valorem taxes on motor vehicles due all incorporated municipalities of more than 100 inhabitants, provided that said municipal corporations have levied such a tax. Quarterly Report of Attorney General, Vol. XIV, page 17.

I answer your second inquiry in the negative. As pointed out in answer to your first inquiry, this office has held that under Schedule 158.12(d) of Section 348 of the Revenue Act of 1935, it is incumbent upon the Tax Assessor and Tax Collector to assess and collect taxes on motor vehicles due all incorporated municipalities of more than 100 inhabitants, **provided that said municipal corporations have levied such a tax.** It is therefore my opinion that a municipality of more than 100 inhabitants could not, by the passage of an ordinance, relieve the Tax Assessor and Tax Collector of the duty imposed upon them by Schedule 158.12(d), supra, of assessing and collecting ad valorem taxes on motor vehicles due said municipal corporation **if such a tax had been levied.** After the tax has been levied and has "accrued" and become an obligation due the municipality by the taxpayer, the municipal governing body is without authority to remit the same. Constitution, Section 100.

It is my opinion, based on the facts set out in your letter of inquiry, that neither you nor the Tax Collector of your county are under any obligation to attempt to provide for the collection of a tax which does not exist.

The municipalities having levied no such tax, you have no duties to perform in connection therewith.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 17, 1939.

Hon. William A. Conrad, Clerk,
Circuit Court, Mobile County,
Mobile, Alabama.

Costs and fees—Suspension of sentence—Probation—

1. Neither trial tax nor docket fee attaches by placing request for probation on the "probation docket" in the court exercising the powers of probation.

2. Clerk of the court exercising powers of probation is not required to make "final record" of the probation proceedings.

3. Clerk of court exercising powers of probation may notify court in which conviction was had of the disposition of application for probation.

4. Fee of $2.00 provided for clerk of the court exercising probation in cases certified from court inferior thereto, if not paid by the probationer as condition of probation, is payable from the funds of the State Department of Corrections and Institutions without the necessity of issuance of execution against the probationer therefor.

5. Witnesses may not be summoned by clerk of court exercising powers of probation for appearance on probation hearings; but if such witnesses voluntarily appear, they cannot be paid from public fun.

6. No solicitor's fee is chargeable on account of the appearance of the solicitor at a hearing on probation.

7. Clerk of court exercising powers of probation is not required to enter proceedings on probation hearing in the minutes of the court.

8. In cases where benefits of probation are extended to defendant, it is not necessary that the probationer should be surrendered into the actual custody of the Department of Corrections and Institutions in order for the cost of the conviction to be payable out of the Convict Fund.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of September 22, 1939, in which you request my opinion as follows:

"Under Senate Bill No. 198-Simpson in cases wherein Defendants are convicted in Justice of the Peace Courts, Inferior Criminal Court of Mobile County, and Recorder's Court of the City of Mobile where a request is made in writing by a Defendant for the benefits of probation and said request is placed on the probation docket of the Circuit Court of Mobile, I would greatly appreciate your opinion on the following questions:

"1. Is the Clerk required to charge trial tax or docketing fee?

"2. Is the Clerk required to make final record of said proceedings?

"3. Is the Clerk required to certify the action of the Circuit Court back to the lower courts?

"4. Is the Clerk required to issue execution for the Two Dollars Clerk's fee provided for by said act and have a return of the Sheriff 'No Property Found' on said execution before he can collect same from the State Department of Corrections and Institutions?

"5. Will witnesses attending upon hearings before the Circuit Court on such applications from lower courts for probation under said act be entitled to the same pay as witnesses in criminal cases?

"6. Is it the duty of the Clerk to issue subpoenas for witnesses on such hearing on said application?

"7. Is the Clerk required to charge a Solicitor's fee for the Solicitors attendance before the Circuit Court on such hearings?

"8. Is the Clerk required to write minutes on probation hearings the same as in criminal cases?

"9. In cases wherein Defendants have been sentenced to imprisonment in the penitentiary or to hard labor for the County and such sentences are suspended and the Defendants put on probation, even though the State Department of Corrections and Institutions did not receive the Defendant, would said State Department of Corrections and Institutions be liable for the costs as provided for in Section 3667 of the Code of 1923 if execution has been issued and returned 'No Property Found?'"

At the outset I would like to impress on you the fact that the answers which are hereafter set out to your several inquiries are of necessity only my opinion on the subject. The courts of this State have not as yet passed upon any of the questions propounded by you, inasmuch as the legislation which precipitated your inquiries has just recently become a part of the statutory law of this state.

I recognize, however, that the clerks of the courts of the State must have some uniform rule to follow so as to protect them when their books and records are examined by the Examining Division of the Department of Finance.

Your inquiries will be answered seriatim.

Inquiry No. 1 is, in substance, as follows:

> 1. Is the Clerk required to charge trial tax or docketing fee in cases wherein Defendants are convicted in Justice of the Peace Courts, Inferior Criminal Court of Mobile County and Recorder's Court of the City of Mobile where a request is made in writing by a Defendant for the benefits of probation and said request is placed on the probation docket of the Circuit Court of Mobile County?

It is to be noted that you use the words "trial tax or docketing fee". It may be that you used those words as describing the same charge, but in this opinion I shall consider "trial tax" and "docketing fee" as two distinct items.

Section 9 of the General Revenue Act, approved July 10, 1935 (General Acts 1935, pp. 256, 263), provides for a "trial tax" in the following language:

> "A trial tax of three dollars ($3.00) be, and the same is hereby imposed in each case, civil, criminal and equity, which is now pending and which hereafter goes upon the docket of any circuit court in this State, to be taxed and collected as other costs, when collected to be paid by the clerk or register of such courts as follows: One-half (½) thereof into the general fund of the State Treasury, and the other one-half (½) into the general fund of the county in which the same is collected *** ."

Section 2 of Act No. 278, S. B. 198, approved August 24, 1939 (which act provides the machinery for probation), is in pertinent part as follows:

> "It shall be the duty of the Clerk of the Circuit Court or Inferior Court from which an appeal lies directly to the Court of Appeals or Supreme Court to keep a docket, which shall be known as the Probation Docket, and to enter upon said docket, in the order in which they are received, all probation cases including those certified to the Circuit Court or Inferior Court from which an appeal lies directly to the Court of Appeals or Supreme Court under the provisions of this act. The Clerk shall be allowed a fee of two dollars for all of his services in probation cases certified to the Circuit Court or Inferior Court from which an appeal lies directly to the Court of Appeals or Supreme Court, which if not paid by the probationer shall be payable out of the funds of the State Department of Corrections and Institutions as other such court costs are now paid."

Considering these two provisions together, the question presents itself as to whether or not the "docket" which the clerk is required to keep under the provisions of the "Probation Act," supra, is a "docket of any circuit court in this State" as those words are used in the 1935 Revenue Act, supra. I do not think so.

It is my opinion that the clerk of the circuit court is not required to charge a trial tax under such circumstances. It is my judgment that, as relates to criminal cases, the "docket" referred to in the 1935 Revenue Act is the regular criminal trial docket which the clerk is required to keep under the terms of Subsection 4 of Section 6724, Code of Alabama, 1923. The "docket" which the clerk is required to keep under the terms of the "Probation Act" is not in any sense a "trial docket." The question as to guilt or innocence has already been determined before the cause is placed on such docket.

The item of costs commonly designated as "docket fee" is provided by the first subsection of Section 3739 of the Code of 1923, as amended by General Acts of 1931, page 331 (Michie's 1936 Supplement, Section 3739). This fee is taxed in **criminal cases** only. The statute, supra, does not apply on probation proceedings.

I think it should be pointed out that the act provides no fee for the clerk in probation matters which originate in the circuit court or in an inferior court from which an appeal lies directly to the Court of Appeals or Supreme Court.

Inquiry No. 2 is, in substance, as follows:

> 2. Is the Clerk of the Circuit Court required to make a final record of proceedings in a case wherein a Defendant is convicted in Justice of the Peace Court, Inferior Criminal Court of Mobile County, or Recorder's Court of the City of Mobile where a request is made in writing by the Defendant for the benefits of probation and said request is placed on the probation docket of the Circuit Court of Mobile County?

Subsection 9 of Section 6723, Code of Alabama, 1923, is as follows:

> "It shall be the duty of the Clerk of the Circuit Court—9. To record in well bound books, within six months after the final determination of any suit or prosecution, all the proceedings relating thereto, not previously recorded under Section 10129(5736), except the subpoenas, affidavits for continuance, commissions to take testimony, evidence and executions."

It is my opinion that the above quoted provision includes only those matters which essentially are a part of the suit or prosecution.

It is my judgment that no "final record" need be made of any such probation proceeding, whether the prosecution out of which such proceedings arose originated in the court exercising probationary powers or in the lower court.

Your inquiry No. 3 is, in substance, as follows:

> 3. Is the Clerk of the Circuit Court required to certify the action of the Circuit Court back to the lower court in a case wherein a Defendant is convicted in a Justice of the Peace Court, Inferior Criminal Court of Mobile County, or Recorder's Court of the City of Mobile, where a request is made in writing by a Defendant for the benefits of probation

and said request is placed on the probation docket of the Circuit Court of Mobile County?

Section 2 of the "Probation Act," supra, is, in pertinent part, as follows:

"Section 2. PROCEDURE ON CONVICTION IN INFERIOR COURT. Where the **Court** rendering judgment and **imposing punishment** is that of a justice of the peace, an inferior court established in lieu of justices of the peace, a county court, recorder's court, court of common pleas, law and equity court or other court of inferior jurisdiction from whose judgments appeal does not lie directly to the Court of Appeals or the Supreme Court, it shall not have the powers to suspend the execution of **sentence**, but such **courts** inferior in jurisdiction to the Circuit Court or Inferior Court from which an appeal lies directly to the Court of Appeals or Supreme Court shall if request is made in writing by a defendant for the benefits of probation, **stay further proceedings** and certify the indictment or complaint and warrant and a copy of its judgment in such case to the Circuit Court or Inferior Court from which an appeal lies directly to the Court of Appeals or Supreme Court of the county in which such inferior court exercises criminal jurisdiction. No defendant shall be permitted to make request for the benefits of probation unless the same is made **within one day after imposition of sentence.** When request is so made by any such defendant, the Court of inferior jurisdiction must certify the case as hereinabove provided, to the said Circuit Court or inferior court from which an appeal lies directly to the Court of Appeals or Supreme Court within five days thereafter. It shall be the duty of the judges of the Circuit Courts or inferior courts from which an appeal lies directly to the Court of Appeals or Supreme Court when such cases are certified to said court, as early as may be practicable, having in mind the interests of public justice, to hold a hearing, under such rules and regulations and in such manner as the Court may prescribe, and determine whether the Court will extend to the defendant named in said certified case the benefits of probation; and the action of the court in granting or refusing probation shall not be revisable by any other court. *** " (Emphasis supplied)

The answer to this question is not without difficulty, but from a careful reading of the section just above quoted, I am of the opinion that the lower court not only enters a judgment as to the guilt of the defendant, but also imposes the sentence. This conclusion, in my opinion, is borne out by the underscored part of the quoted statute. You will note that the Legislature refers to the courts **rendering judgment and imposing punishment** and that it further provides that such courts shall not have the power to suspend the execution of **sentence,** but shall have the right to stay further proceedings; and provides further that "no defendant shall be permitted to make request for the benefits of probation unless the same is made within one day after **imposition of sentence.**" In my judgment, it was the legislative intent that the lower court which finds the defendant guilty shall likewise sentence him, but that a stay of such sentence may be brought about by the defendant's request for the benefits of probation.

In the event the circuit court or inferior court from which an appeal lies directly to the Court of Appeals or Supreme Court grants probation, there is no absolute necessity for the lower court being informed as to the outcome of the probation proceedings in such court in view of the fact that the defendant then comes under the jurisdiction and supervision of the probation

officials. However, I think that it would be the better practice for the clerk of such court to advise the lower court of what has taken place. In the event the circuit court or inferior court from which an appeal lies directly to the Court of Appeals or Supreme Court should deny probation, then I think it would be wise for the clerk of such court to advise the lower court of the order refusing probation so that the lower court may see that its sentence is carried out.

In answer to your fourth inquiry, which is:

> "4. Is the Clerk required to issue execution for the Two Dollars Clerk's fee provided for by said act and have a return of the sheriff of 'No Property Found' on said execution before he can collect same from the State Department of Corrections and Institutions?"

in my opinion there is no authority of law for the issuance of execution for the collection of the $2.00 Clerk's fee provided by the "Probation Act." The court may require this fee paid by the probationer or may require its payment, together with all the costs or any part of same, before his probation becomes effective. But, if the court should fail to make such an order, then it is my opinion that this fee is paid as provided by Section 2 of the act, viz:

> " *** The clerk shall be allowed a fee of two dollars for all of his services in probation cases certified to the circuit court or inferior court from which an appeal lies directly to the Court of Appeals or Supreme Court, which, if not paid by the probationer, shall be payable out of the funds of the State Department of Corrections and Institutions as other such costs are now paid."

In answer to your fifth inquiry, which is:

> "5. Will witnesses attending upon hearings before the Circuit Court on such applications from lower courts for probation under said act be entitled to the same pay as witnesses in criminal cases?'

I find no authority of law for summoning witnesses in probation proceeding. The court hearing a petition under this act ordinarily would not go into the facts of the original case and try the case again. The original case is closed, so far as this proceeding is concerned, when the defendant is convicted; and the only questions which should be considered at the hearing for probation are the extenuating circumstances, the defendant's previous character, etc., to try to determine whether or not he would be likely to lapse again into crime, and if society may safely trust him at large. If the court feels that the case should be further investigated, he may call upon the probation officer to make such further investigation, under Section 3 of the Probation Act, supra, and report to him in writing. Section 3 is as follows:

> "Section 3. INVESTIGATION. When directed by the court the probation officer shall fully investigate and report to the Court in writing the circumstances of the offense, criminal record, social history and present condition of defendant. No defendants unless the Court shall otherwise direct, shall be placed on probation or released under suspension of sentence until the report of such investigation shall have been presented to and considered by the court. Provided, however, that after

conviction the court may continue the cause for such time as may be reasonably necessary to enable the probation officer to make his investigation and report. Whenever practicable, such investigation shall include physical and mental examinations of the defendant. If such defendant is committed to an institution, a copy of the report of such investigation shall be sent to the Department of Corrections and Institutions at the time of commitment."

Section 2 of the Probation Act, supra, provides in part:

"It shall be the duty of the judges of the Circuit Courts or inferior courts from which an appeal lies directly to the Court of Appeals or Supreme Court when such cases are certified to said court, as early as may be practicable, having in mind the interests of public justice, to hold a hearing, **under such rules and regulations and in such manner** as the Court may prescribe *** ." (Emphasis supplied)

Under this provision, the Court may adopt such rules and regulations not inconsistent with the law, as to it seems proper. Such rules and regulations may include provisions for the hearing of witnesses appearing voluntarily in behalf of the prospective probationer or in opposition to probation. But if such witnesses are heard on the probation proceeding, no fees can be paid from public funds for their attendance.

The answer to your fifth inquiry dispenses with the necessity for answer to the sixth.

My answer to your seventh request, which is:

"7. Is the Clerk required to charge a Solicitor's fee for the Solicitor's attendance before the Circuit Court on such hearings?"

is in the negative. It is true that Section 2 of the act, supra, provides, among other things, that it shall be the duty of the solicitor of the circuit court and of all other courts inferior in jurisdiction to the circuit court, or inferior court from which an appeal lies directly to the Court of Appeals or Supreme Court, to attend upon said hearings when directed by the judge conducting the same; but neither this section nor any other provision of law allows solicitor's fee to be charged on the probation proceeding. The reason, I presume, for this is that these proceedings are not criminal prosecutions.

My answer to your eighth question, which is:

"8. Is the Clerk required to write minutes on probation hearings the same as in criminal cases?"

is in the negative. This is not a "case," strictly speaking, but is an ex parte proceeding conducted without regard to strict rules of pleadings or evidence. All the record that is necessary is the order of the judge which is placed on the probation docket under each case.

Answering your ninth inquiry, which is:

"9. In cases wherein Defendants have been sentenced to imprisonment in the penitentiary, or to hard labor for the County and such sentences are suspended and the Defendants put on probation, even though the State Department of Corrections and Institutions did not receive custody of the defendants, would said State Department of Corrections and Institutions be liable for the costs as provided for in Section 3667 of the Code of 1923 if execution has been issued and returned 'No Property Found?'"

it is my opinion that if the defendant has been placed on probation and the sentence has been suspended, the costs, if not paid by the probationer, would be payable "in the same manner and from the same funds or sources as if no suspension of execution of sentence had intervened," notwithstanding the fact that the probationer has not come into the actual custody of the prison authorities.

I am of the opinion that Section 8 of the Probation Act, supra, supersedes, pro tanto, that provision of law which requires the prisoner to be delivered to the prison authorities before the costs can be paid. Section 8 provides:

"Section 8. Any provision of law to the contrary notwithstanding allowances, costs and fees of officers of courts and of state witnesses in any cases in which sentence is suspended and the defendant put on probation, shall be paid in the same manner and from the same funds or sources as if no suspension of execution of sentence had intervened."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 18, 1939.

Hon. W. L. Brown,
President, Board of Revenue,
Shelby County,
Columbiana, Alabama.

Sheriffs—Costs and Fees—Juveniles—

Arrest fee and guard allowance held to accrue at the time the services are performed by the sheriff, and when the defendant is determined to be a juvenile and his case is transferred from the circuit court or county court to the juvenile court, said fee and allowance become legal charges against the fine and forfeiture fund of the county.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of September 20, 1939, in which you request my opinion as follows:

> "Attached hereto you will find copy of bill filed with the Board of Revenue by the Sheriff of this county for fees and expense in juvenile cases. You will note that this man was arrested on indictment by the Grand Jury charged with distilling. Later this case was transferred to the Juvenile Court. Is the General Fund of the county liable for the arrest and guard fee in this case?"

In reply, I wish to advise that your request requires a determination of when the guard allowance and the arrest fee in the cases named by you attached. In my judgment, this fee and allowance attach at the time the services are performed. I refer you to question No. 29 in an opinion of the Attorney General addressed to Hon. Chas. W. Lee, State Comptroller, under date of February 7, 1936, and reported in Quarterly Report of Attorney General, Vol. II, page 118, which is as follows:

> "'Question 29. A defendant is indicted for a felony and is arrested by the Sheriff on capias or warrant of arrest for such felony but on the trial of the case he is convicted of a misdemeanor, would the fee for executing such capias or writ of arrest be $4.00 or $2.00?'
>
> "The answer to this question requires that a determination be made of when the fee attached. At the time the services are performed the defendant is charged with a felony and is indicted for a felony, but because of evidence or circumstances growing out of the trial of the defendant, he is finally convicted of a misdemeanor. In my opinion, the fees attach at the time the service is performed and become a liability in the amounts allowed by law for such services chargeable to the defendant upon conviction. It is therefore my opinion that the fee for executing the writ of arrest or capias charging a felony would be $4.00 as provided by law."

This office has often held that a juvenile offender is not a prisoner within the contemplation of the criminal statutes. Biennial Report of Attorney General, 1934-36, p. 178. I wish to further refer you to a recent opinion of the Attorney General addressed to Hon. Henry W. Smith, Sheriff, Etowah County, Gadsden, Alabama, under date of August 5, 1939, copy of which opinion I enclose for your convenience.

In the instant case the defendant was arrested under an indictment charging a crime for which an arrest fee of $4.00 and a guard allowance of $2.00 was provided. At the time of the arrest, and until the prisoner was determined to be a juvenile delinquent, he was, for the purposes of assessing costs, in the same category as other prisoners charged with the same degree of crime. See opinion of the Attorney General reported in Biennial Report of Attorney General, 1934-36, p. 178.

In the opinion next above named, you will note that this office has announced the holding that a transfer from the circuit court or county court to the juvenile court of a case in which the facts and circumstances parallel

those set out by you, is, in effect a nolle prosequi. Furthermore, it is a case in which the defendant was not convicted. Therefore, the costs and fees which accrued in the circuit court and county court are proper charges against the fine and forfeiture fund of the county. See Biennial Report of Attorney General, 1926-28, p. 749.

Premises considered, it is my opinion that the arrest fee and guard allowance attach at the time the services are performed, and that the fine and forfeiture fund, or in case of its abolition and consolidation with the county general fund, then the county general fund, is liable for the costs above named.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 18, 1939.

Hon. John C. Curry, Commissioner,
State Department of Revenue,
Capitol.

Taxation—Sheriff's levy for the collection of delinquent taxes—Claim of Exemption by taxpayer.

1. When warrant for the collection of delinquent taxes, issued by the Revenue Department under Section 11 of Acts, Extra Session, 1936-37, page 125, is placed in the hands of Sheriff, and upon levy made by the Sheriff, the delinquent taxpayer makes claim of exemptions, it is the duty of the Sheriff to disregard the claim of exemptions and to proceed with the levy and sale as if no such claim had been filed.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of October 4, 1939, in which you request my opinion as follows:

"On July 13, 1939 the books and records of John Foster, doing business as Pine Grove Grocery & Market, Crichton, Alabama, were audited by an auditor from this Department with reference to the sales tax due under the Act found in the General Acts for the Extra Session, 1936-37, p. 125. As a result of this audit an additional liability of $145.61 was found to be due by Mr. Foster to the State of Alabama for the period March 1, 1937 through February 28, 1939. Reports were prepared for this period by the auditor from this Department showing the additional lia-

bility and they were presented to Mr. Foster who signed the same as being true and correct.

"This tax not being paid, under the provisions of Section 11 of this Act, a warrant was issued by this Department to the sheriff of Mobile County directing him to levy on and sell the real and personal property of this taxpayer or so much thereof as might be necessary for the payment of these taxes, damages and the cost of executing the warrant.

"On October 2, 1939, this Department received notice from the Sheriff of Mobile County, that the stock of goods belonging to Mr. Foster had been levied upon and that the taxpayer had filed a claim of exemptions.

"Will you kindly let us know.

"1. Whether it will be necessary for me to contest the claim of exemptions filed by the taxpayer?

"2. Can a claim of exemptions be set up against any taxes?

"3. What should this Department do with reference to collecting the tax in this case?"

Your questions are so interrelated that all of them may be answered by a general discussion of the legal principles involved. Answering the first two questions specifically, it is my opinion that it is not necessary for the Commissioner of Revenue, on behalf of the State, to file any contest of the alleged claim of exemptions filed by the taxpayer with the Sheriff upon the levy on the property; and it is further my opinion that no claim of exemptions may be set up by the taxpayer against the collection of the taxes by the Sheriff, under warrant from the Department of Revenue.

Section 11 of Acts, Extra Session, 1936-37, page 125 (134), provides in part:

"(a) If any tax imposed or any portion of such tax be not paid within sixty days after the same becomes due, the Commissioner shall issue a warrant under official seal directed to the Sheriff of any county of the State commanding him to levy upon and sell the real and personal property of the person owing the same, found within his county, for the payment of the amount thereof, with damages, to the amount of ten per cent of the tax in addition to the penalties imposed for failure to make or for making a fraudulent return and interest, and cost of executing the warrant, and to return such warrant to the Commission and pay it the money collected by virtue thereof by a time to be therein specified, not more than sixty days from the date of the warrant. The Sheriff shall within five days after the receipt of the warrant, file with the Circuit Clerk of his county a copy thereof, and thereupon the Circuit Clerk shall enter in the judgment roll, in the column for judgment debtors, the name of the taxpayer mentioned in the warrant, and in appropriate columns, the amount of the tax, or portion thereof and damages for which the warrant is issued; and the day when such copy is filed; and thereupon the amount of such warrants so docketed shall become a lien upon the title to and interest in real and personal property, including choses in action, except negotiable instruments, not past due, of the person against whom it is issued in the same manner as a judgment duly en-

rolled in the office of such clerk. The Sheriff thereupon shall levy upon any property of the taxpayer, including negotiable instruments, in all respects, with like effect, and in the manner prescribed by law in respect to executions issued against property upon judgments or attachment proceedings, of a court of record and the remedies of garnishment shall apply and the officer shall be entitled to the same fees for his services in executing the warrant as now allowed by law for like services, to be collected in the same manner as now provided by law for like services."

By Sections 172 of the General Revenue Act of 1935 (General Acts, 1935, page 340) it is provided:

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"Section 172. No property shall be exempt from levy and sale for the payment of taxes and the fees and charges lawfully incurred in assessing and collecting taxes against the owner thereof."

Of course, the sheriff is an executive officer and does not have authority to determine the judicial question as to **the sufficiency** of a claim of exemptions filed by a debtor in connection with a levy upon the debtor's property by the Sheriff by virtue of process in his hands, commanding such levy. This rule applies only in those cases in which the claim of exemptions is allowable under any given circumstances or facts. If no claim of exemptions is allowable in any event, then the Sheriff must disregard the same and proceed with the levy and sale as if no claim of exemptions had been filed. The rule is clearly stated in **Kennedy v. Smith,** 99 Ala. 83, 11 Sou. 665. Mr. Justice Thorington, speaking for the court, said:

"Upon the filing of this claim of exemption with the sheriff and due notice thereof given to the attorney or the plaintiff in execution, and the failure of the latter to file a contest of the exemption claim within the time prescribed by law, the right and duty of the sheriff to sell under the execution ceased, notwithstanding the indemnity, and it became mandatory upon him by the terms of the statute (Code, Section 2521) to discharge the levy, and deliver the property to the defendant in execution, from whose possession it appears from the testimony it was taken when the levy was made.

"In such case the sheriff has no discretion to disregard the claim of exemptions. The law does not invest him with judicial powers which authorize him to determine the legal sufficiency of the claim of exemption; that is to be done upon a contest instituted pursuant to the statute, and where, if the claim is insufficient, it may be amended, and a trial of its validity obtained.—

Block v. Bragg, 68 Ala. 291; Abbott v. Gillespy, 75 Ala. 180. **The only case in which the sheriff can disregard a claim of exemption, however informal or irregular, interposed by a defendant in execution within the time prescribed by the statute, is where the execution is issued upon a judgment based upon tort, or other demand against which the statute does not authorize a claim of exemption to be interposed. It has been held by this court, that where it appears from the face of the papers the case is one not governed by the exemption laws, it is the duty of the sheriff to disregard the claim of exemption, and to proceed with the sale of the property."** (Emphasis supplied)

The warrant issued by the Revenue Department under the authorization of Section 11 of Acts, Extra Session, 1936-37, page 134, quoted supra, "shows

on its face that the case is not one governed by the exemption laws," and, in the event of a claim of exemptions filed with the Sheriff making the levy thereunder, it is the duty of the Sheriff to disregard the claim of exemptions and to proceed with the levy and sale of the property as if no claim of exemptions had been filed.

Answering your third inquiry, as to what the Revenue Department should do to effect the collection of the delinquent taxes in the specific case detailed in your request for opinion, it is my opinion that you should advise the Sheriff to proceed with the levy and to sell the property for the collection of delinquent taxes. I have no doubt that the Sheriff of Mobile County on being apprised of the rule laid down by the Supreme Court, quoted hereinabove, will disregard the alleged claim of exemptions filed in this case and will proceed to collect the taxes, as is required by law.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

October 18, 1939.

Hon. William C. Hare,
County Solicitor,
Macon County,
Tuskegee, Alabama.

Witness Mileage—County Solicitor—

1. State witnesses can only be paid mileage within the State boundaries.

2. County may not furnished county solicitor with typewriter.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of September 15, 1939, in which you request my opinion as follows:

"I have two points on which I would like some information and will appreciate your advising me in same.

"We have two first degree murder cases that will be called in our October term of Circuit Court and one of the main witnesses is now living in Dallas, Texas. She is the daughter of the deceased who the State charges was killed by his nephew and his wife and I am very anxious to have her here and want to know if there is any provision whereby the county can pay her expenses from Dallas to Tuskegee and back. Inci-

dentally, the other witnesses in this case do not speak very good English, and this woman is the State's strongest witness and I am most anxious to have her here.

"The other question is, is the Board of Revenue empowered to furnish the County Solicitor a typewriter and other office equipment? As you know, I occupy my own office and do not make any demand on the county for any office expense whatsoever. I do find, however, numerous occasions when I have to go out to take testimony for the County and Circuit Court cases, that I need a portable typewriter and the county is willing to supply same if they are permitted to do so under the law."

You inquire in question one if the county may pay the expenses of a witness from Dallas, Texas, to Tuskegee, Alabama, and back. It is my opinion that the witness may only be paid for mileage from the State line to Tuskegee and back to the State line.

Section 3762 of the Code of 1923, which has been amended by the General Acts of Extra Session of 1932, page 102, says that a witness is entitled to 75c a day and 5c per mile from and to his home by the most traveled route.

The above section has been held to be applicable only within the borders of the State. In the case of **Friddle v. Braun, et al.,** 7 Ala. App. 429, 61 So. 57, it was said:

"The provisions of this statute (Section 4021, the forerunner of Section 3762), however, must necessarily have reference only to processes and distances within the limitation of the borders of the State, the territorial boundary line of authoritative legislative enactment."

It was, however, held in **Elliott v. Howison,** 158 Ala. 71, 48 So. 508, that witnesses living more than one hundred miles from the trial were entitled to their mileage so long as they remained within the State.

This office has held in numerous opinions that witnesses could not be paid for mileage from outside the State, in accordance with the cases cited above. In Vol. VI, Quarterly Report of the Attorney General, page 107, it was held that witnesses residing out of the State can only be paid mileage from the State line. Also in the Biennial Report of the Attorney General 1928-30, page 763, it was held that witnesses are allowed mileage from the State line only. See also opinion to Hon. L. B. Clarke, under date of June 17, 1927, found in Volume II, Office Edition, page 196, a copy of which is enclosed.

This office has held in an opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, under date of February 28, 1939, Quarterly Report of Attorney General, Vol. XIV, page 156, that the county cannot pay for repairs of typewriter of county or circuit solicitors. For your information, I quote the following paragraph from the above cited opinion:

"This office has held that a county cannot pay for stationery for the county or deputy solicitor. Biennial Report of Attorney General 1926-28, page 695, Quarterly Report of Attorney General, Vol. VI, page 108. **If it cannot purchase stationery for the county solicitor it cannot purchase**

a typewriter. It is cannot purchase a typewriter it cannot pay for repairs for same." (Emphasis ours)

I believe this opinion will sufficiently answer your second inquiry.

The 1939 Legislature has recently passed and the Governor approved, Act No. 329, H. B. 147, approved August 31, 1939, which contains a provision furnishing deputy solicitors, solicitors and assistant deputy solicitors with office equipment. This section does not affect the ruling of our office in regard to your second inquiry, since we believe it to be inapplicable because this act states, "deputy solicitors a part of whose salary is paid by the State, and assistant deputy circuit solicitors a part of whose salary is paid by the State." Even though the county solicitors appointed under Section 5522 of the Code of 1923 are designated therein as deputy solicitors they are paid solely by the county under the authority of Section 5523 of the Code of 1923, and it is my opinion that they do not come within the purview of the act cited above.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 18, 1939.

Hon. H. M. Hughes,
Clerk, Circuit Court,
Madison County,
Huntsville, Alabama.

When money is paid into the county treasury or county depository from money collected for witness claims, the statute of limitations does not begin to run against such witness claims until such money has been collected and has become **subject to disbursement.**

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 7, 1939, in which you request my opinion as follows:

"This year, when the Madison County Equity Court rendered a decree prorating the $5,000.00 paid into said Court by the bondsmen of the defaulting, now Ex-Clerk of the Circuit Court, James G. Stogner, the pro rata part for witness fees—collected by him and not remitted—was more than $1,300.00. Said amount was paid over to Madison County Depository, and set up as a special witness account.

"More than three years have elapsed since said witness certificates were issued by James G. Stogner. However, the witnesses that hold the

certificates were unable to collect from Stogner; and I was unable to pay them for the reason that he failed to turn over to me the money with which to pay them, when I succeeded him as Clerk of Circuit Court.

"Under the circumstances, I ask for an opinion. Should the Madison County Depository pay the witnesses—on proration basis as set up by the Court—or should the amount be transferred to the Fine and Forfeiture Account?"

I gather from your statement of facts that there was $5,000.00 paid into court by the bondsmen of James G. Stogner, the defaulting Ex-Clerk of the Circuit Court of Madison County; that this money was paid during the present year and the pro rata part for witness fees amounted to something over $1,300.00; and that this amount was paid over to the county depository. You also state that there were a number of outstanding witness certificates unpaid, and that the persons holding these witness certificates were unable to collect for the reason of the Ex-Clerk's default. You then ask our advice as to the disposition of the money.

In this connection, I call your attention to an act approved February 16, 1939, General Acts 1939, p. 34. This act amends Section 7245 of the Code of Alabama, 1923, and changes the time of presentment of witness claims from six to three years. This office has held in opinions to Hon. Sam Drinkard, Ex-Sheriff, Marengo County, Linden, Alabama, (Quarterly Report of Attorney General, Vol. XV, p. 101), and to Hon. R. J. Westbrook, Circuit Clerk, Marengo County, Linden, Alabama (Quarterly Report of Attorney General, Vol. XV, p. 226), that this amendment is applicable to all outstanding witness claims without regard to when the same were issued.

I call your attention to Section 2 of the act, supra, where it says:

"All claims for witness fees, reported by the clerk, paid over to the county treasurer or custodian of county funds, shall be forever barred after three years from the time such fees are collected and **subject to disbursement.**" (Emphasis supplied)

According to the language of Section 7245 as amended, supra, these claims are not barred until three years from the date such fees are collected, and become **subject to disbursement.** If the time be computed from the date of collection by the Ex-Clerk, these claims would be barred, since three years have elapsed from the date of collection, but we must also determine whether three years have elapsed from the date such fees became subject to disbursement. In my opinion, they were not subject to disbursement prior to the time the bondsmen paid this money into court, for the reason that, though moneys in payment of these fees had been collected by the Ex-Clerk, the funds were not available to pay the same because of his default. When the time is computed from the date this money was paid into court, it is readily seen that three years have not elapsed, and, therefore, it is my opinion that these claims are not barred by the above quoted statutory provision, and that they may be paid pro rata to the persons holding the same.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 18, 1939.

Hon. H. M. Hughes,
Clerk, Circuit Court,
Madison County,
Huntsville, Alabama.

Witness Certificates—

Witness certificates issued for attendance on court become barred from payment within three years after fees are collected and become subject to disbursement, but both contingencies must have occurred—they must have been collected and become subject to disbursement.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 7, 1939, in which you request my opinion as follows:

"Your opinion of August 19, 1939, to Mr. H. C. Landman, Cashier of First National Bank here—which is the Madison County Depository—has been turned over to me to read. I wish to make some explanations, of which—I feel sure—Mr. Landman was not aware.

"Soon after I was inducted into the office of Circuit Court Clerk, January 15, 1935, I was confronted with many partial payment receipts —on fines and costs—given by the Ex-Clerk, James G. Stogner. Upon an opinion rendered me from the Attorney General's Office, I took up such receipts and allowed the defendants to pay me the amount due after deducting the amount paid to the Ex-Clerk. I carried same in a Trust Account, until my records were examined by one of the State's Assistant Examiners of Public Accounts. This I was advised to do from the State Comptroller's Office.

"Hon. A. E. Ledyard, one of the State's Assistant Examiners, audited my records to January 1, 1939. He prorated the partial collections that were made by me, and dated them as of the day I received such payments. However, I receipted the Fee Books for said amounts that I had received, as of December 31, 1938. Since I had been carrying such amounts in a trust account—awaiting the proration by the Examiner, I thought this the proper thing to do. As Mr. Ledyard showed the proration of the partial payments of witness fees as of the date the payments were made to me, this showed such witness fees to have been in my hands, unclaimed, for two years; and he transferred them to Madison County Depository. Many of the witnesses presented the witness certificates to me for payment; and I had to advise them that they would have to wait until the proration was made by the State's Examiner. I wish to say that the witnesses, at no time, have had the opportunity to collect any part of their witness claims.

"When Mr. Ledyard dated the proration of the partial payments as of date they were paid to me, instead of dating them as of the day I

made the settlement with him, December 31, 1938, the law provided six years in which the witnesses might claim their fees. Shortly after he made the transfer to the Madison County Depository, the law was changed to three years, instead of six. Now, more than three years have elapsed since the issuance of such witness certificates.

"I am asking for an opinion—the circumstances explained to be considered—whether or not the Madison County Depository should pay said witnesses their pro rata share; or should said amount be transferred to the Fine and Forfeiture Account."

I gather from your statement of facts that these are witness fees which have been collected in part by your successor, who misappropriated same and also in part by you, giving credit under instructions from the Examining Department for amounts collected by your predecessor; that you were advised by the Comptroller when you collected any balance that these collections should be deposited in a trust fund and that you did this; that the Examining Department prorated the partial collections made by you and dated them as of the date you received such payments.

In this connection, I call your attention to an act approved February 16, 1939, General Acts 1939, p. 34. This act amends Section 7245, Code of Alabama, 1923. This amendment changed the time of presentment of witness claims from six years to three years, and this office has held in opinions to Hon. Sam Drinkard, Ex-Sheriff, Marengo County, Linden, Alabama, (Quarterly Report of Attorney General, Vol. XV, p. 101), and to Hon. R. J. Westbrook, Circuit Clerk, Marengo County, Linden, Alabama (Quarterly Report of Attorney General, Vol. XV, p. 226), that this amendment is applicable to all outstanding witness claims without regard to when the same were issued.

I now call your attention to Section 2 of the act, supra, where it says:

"All claims for witness fees, reported by the clerk, paid over to the county treasurer or custodian of county funds shall be forever barred after three years from the time such fees are collected, and **subject to disbursement.**" (Emphasis supplied)

According to the language of Section 7245, as amended, supra, these claims are not barred until three years from the time such fees are collected, and become **subject to disbursement.** If the time be computed from the date of collection, these claims would be barred, since three years have elapsed from the date of collection, but we must also determine whether or not three years have elapsed from the date such fees became subject to disbursement. When these funds were collected, they could not be paid out to the parties holding the claims for the reason that you, acting on the advice of the State Comptroller, had placed the same in a trust fund, and, therefore, they were not then subject to disbursement. Consequently, they did not become subject to disbursement until after the representative of the State Comptroller's Office, that is, the Assistant Examiner of Public Accounts, transferred them from the trust fund to the Madison County Depository. When the time is computed from this date, it is readily seen that three years have not elapsed, and, therefore, it is my opinion that these claims are not yet barred by the above quoted statutory provision, and that they may now be paid pro rata to the persons holding the same.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

October 18, 1939.

Hon. Ed. B. James,
Superintendent of Education,
Perry County,
Marion, Alabama.

County Board of Education—Expenses of Collection of Special Three Mill Tax—

County Board of Education not authorized to pay to county tax collector additional compensation in connection with the collection of three mill tax levied during tax year, but after abstract of tax assessor has come into the hands of the tax collector.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of September 18, 1939, in which you request my opinion as follows:

"I would like to have your office submit a ruling in the following situations:

"The Perry County Board of Education petitioned the Court of County Commissioners to call an election on September 27, 1937 to extend the three-mill and one-mill county-wide taxes from 1947 to 1964, and to consolidate the school districts into two districts and to levy a special district three-mill tax in those districts running for a period of ten years.

"The election was carried on September 27, 1937 and the Court of County Commissioners met on September 30, 1937 to canvass the election returns and levy the tax.

"Honorable Frank Gordon, Attorney, was employed by the Perry County Board of Education to write the four election notices, namely the three-mill county-wide, the one-mill county-wide, the proposed District number One (1) and the proposed District number Two (2).

"After the Court of County Commissioners had levied the tax on September 30, 1937, Mr. Frank Gordon, on his own initiative and with no authority from the Perry County Board of Education, offered Mr. G. R. Johnson, Tax Collector, the sum of one hundred and twenty-five dollars ($125.00) for his services in changing his tax books and setting up the new tax so that it could be collected for the year beginning October 1, 1938.

"Mr. Gordon afterwards submitted a bill covering his fee for writing the election notices in the sum of sixteen hundred and twenty-five dollars ($1625.00). In submitting the bill, Mr. Gordon claimed two hundred and twenty-five dollars ($225.00) for each of the elections notices or a total of nine hundred dollars; fifteen per cent of the new revenue (approxi-

mately $4000.00) amounting to six hundred dollars ($600.00) and the one hundred and twenty-five dollars ($125.00) that he offered Mr. Johnson, the Tax Collector. This made the total bill as submitted sixteen hundred and twenty-five dollars ($1625.00).

"The Board of Education thought this an unreasonable fee and refused to pay it. We found that fees for similar work in other counties ran from twenty-five dollars ($25.00) to two hundred and fifty dollars ($250.00). The Board of Education offered Mr. Gordon seven hundred and fifty dollars ($750.00) for his services, which he first refused, but later accepted as payment in full.

"It now develops that Mr. Gordon has not paid Mr. Johnson the one hundred and twenty-five dollars ($125.00) he promised. In view of fees paid in other counties for similar services the Board of Education feels that the amount paid by it and accepted by Mr. Gordon was certainly a liberal fee, and is an amount large enough for him to pay Mr. Johnson the amount promised him, if he desired so.

"It is not sure that Mr. Johnson was supposed to change his books. However, Mr. Gordon says he was.

"Now that Mr. Gordon has refused to pay Mr. Johnson, he (Mr. Johnson) is insisting that the County Board of Education shall pay it. He contends that I, as County Superintendent of Education, can legally pay the sum of one hundred and twenty-five dollars ($125.00) as promised him by Mr. Gordon.

"I would like for you to give me an opinion as to the following:—

"1. Is the County Board of Education liable for a sum of money promised a party by another party who is employed by the Board of Education to do a specific job of writing election notices?

"2. Can I, as Superintendent of Education legally pay Mr. Johnson the sum of one hundred twenty-five dollars ($125.00) for the services mentioned, and under the circumstances, although the payment is not authorized by the Board of Education?

"3. Can Mr. Johnson legally submit a bill to the County Board of Education for the sum of one hundred and twenty-five dollars ($125.00) for the services mentioned?

"4. Is the Board of Education in any way obliged to Mr. Johnson for the one hundred twenty-five ($125.00) dollars?

"5. Is this a personal matter between Mr. Johnson and Gordon?

"6. Because Mr. Gordon was representing the Board of Education in the election, was he within his rights to offer Mr. Johnson one hundred and twenty-five dollars ($125.00) without authority from the Board of Education for changing his books?

"7. Under the circumstances can Mr. Gordon expect the Board of Education to pay Mr. Johnson for a promise made Mr. Johnson by him (Mr. Gordon)?"

In my opinion, the County Board of Education of Perry County is not authorized to pay the tax collector anything on account of his alleged services in connection with the collection of the special three mill school tax levied during the tax year, but after the tax assessor has turned over to the tax collector the abstract showing the amount of taxes collectible. During the late Fall of 1938, Hon. Gaius R. Johnson, Tax Collector of Perry County, addressed an inquiry to this office concerning this identical transaction. On January 13, 1939, we gave him the benefit of our views on the matter in an informal letter, addressed to him. A copy of that letter is enclosed herewith.

Section 190 of the Revenue Act of 1935 (General Acts, 1935, p. 345) provides:

"Section 190. The tax collector shall collect all countywide and school district taxes and shall report and disburse such taxes in the manner provided by law."

Section 161 of the Revenue Act of 1935 (General Acts, 1935, pages 335-6) provides, in part:

"* * * the tax collector shall be entitled to receive commissions on taxes collected by him, not including taxes on real estate bid in by the state at tax sale as follows: (Here follows the schedule of commissions). * * * The tax collector shall receive two per cent commission on all special county or district taxes levied for school purposes."

So that the quoted excerpt from Section 161 of the Revenue Act, supra, provides the only compensation for the tax collector for the performance of his official duties, as such, in and about the collection of special taxes levied for school purposes.

Any private agreement made by the person who is the incumbent in the office of tax collector (but not in his official capacity, as such), with an attorney employed by the County Board of Education to advise the Board in connection with the compliance with the provisions of law looking toward the levy of such special school taxes, is of no concern to the County Board of Education; and funds under the control of said Board cannot be expended in carrying out the provisions of any such private agreement.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 18, 1939.

Hon. J. Percy Oliver,
Judge of Probate,
Tallapoosa County,
Dadeville, Alabama.

Counties—Judges of Probate—Driver's licenses—Postage for mailing applications for driver's licenses, temporary instruction permits, and reports, and remitting fees collected, to the Director of Public Safety, State Comptroller or State Treasurer, as the case may be, held a proper charge against the county.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of October 9, 1939, in which you request my opinion as follows:

"The postage in handling driver's license in this county will exceed $100.00. Is this a proper charge against the county?"

I presume that by "postage in handling driver's license" you mean the postage necessary for you to comply with the provisions of Section 3 of Act No. 181 (General Acts, 1939) approved March 18, 1939, and effective September 30, 1939, which is the new Driver's License Law or Highway Patrol Act, which reads as follows:

"Section 3. At the close of business on Monday of each week when any application has been received or temporary instruction permit hereinafter provided for has been issued, the Judge of Probate receiving such application or issuing such permit shall prepare a report of the same upon a form which shall be provided by the Director of Public Safety. One copy of such report, together with all applications received and copies of all permits issued shall be forwarded to the Director of Public Safety and one copy shall be retained by the Judge of Probate. On the 10th day of every month the Judge of Probate shall prepare a report showing the number of applications received and permits issued and the amount of fees received during the previous calendar month. One copy of such report shall be forwarded to the Director of Public Safety, one to the State Comptroller, one to the State Treasurer, and he shall retain a copy. He shall also at said time deliver to the State Treasurer the amount of all such fees collected less ten cents (10c) for each application received or permit issued, which sum shall be retained by him, and shall be his sole compensation for performing any and all duties required of him under the provisions of this Act. All funds remitted to the State Treasurer under the provisions of this Section shall be kept in a separate fund in the State Treasury to be known as the 'Highway Patrol Fund.'"

Section 9604 of the Code of Alabama, 1923, as amended by Act No. 595 (General Acts 1927, p. 693) approved September 6, 1927, reads as follows:

"Section 9604. Stationery of officers paid for by county.—The judge of probate, tax assessor, tax collector, register of the circuit court in equity, clerk of the circuit court, sheriff and the county treasurer or

custodian must be allowed reasonable expenses, for suitable books, stationery, postage stamps used exclusively for official business, and telephones to be paid for by the county, on the approval of the court of county commissioners, board of revenue or other like governing body, and the judge of probate shall also be allowed expense for his seal of office, to be paid for by the county."

Certainly, the postage necessary for the Judge of Probate to comply with the provisions of Section 3, supra, is postage "for official business" and, in my opinion, under the provisions of Section 9604, as amended, supra, the Judge of Probate must be allowed reasonable expenses therefor to be paid by the county. Cf. Opinion to Hon. Chas. W. Lee, State Comptroller, Capitol, under date of August 18, 1938 (Quarterly Report of Attorney General, Vol. XII, p. 111, Biennial Report of Attorney General, 1936-38, p. 743).

It might be thought that, since all of the fees collected under the provisions of the New Driver's License Law or Highway Patrol Act, except the fee provided by Section 3, supra, for the Judge of Probate, are covered into the State Treasury to the credit of the Highway Patrol Fund, and no part thereof goes to the County, the State and not the County should bear the expense of this postage. It suffices to say, however, that the Legislature has not seen fit to so provide, but, on the contrary, as the above quoted statutory provisions indicate, has seen fit to make such postage a charge against the County.

It might also be suggested that, since the Judge of Probate receives a fee for each application for driver's license which he takes, or temporary instruction permit which he issues, this postage should be paid by him out of these fees. Again, however, it suffices to say that the Legislature has not seen fit to so provide. In this connection, it might be further observed that the Judge of Probate, in all counties operating under the general law, receives a fee for practically every official act which he performs, and, yet, under the provisions of Section 9604, as amended, supra, reasonable expenses "for suitable books, stationery, postage stamps used exclusively for official business and telephones" in connection with the performance of these official duties must be paid for by the county.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 19, 1939.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Act No. 65, H. B. 57, approved March 2, 1939, does not give the State of Alabama the right to tax lands held by the United States Government.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 26, 1939, in which you request my opinion as follows:

"An Act approved March 2, 1939, which reads as follows:

" 'Sec. 1. That property and activities of the United States and its agencies shall be taxable as other property and activities, except where the State of Alabama is without constitutional authority to impose such taxes.

" 'Sec. 11. All laws or parts in conflict herewith are hereby repealed.'

"Under this Act does the Resettlement Project, where the Government has built hundreds of houses and is renting them, without deed, to the person residing therein and who are to eventually have the property deeded to them, such rent as they have heretofore paid being considered as a partial payment on the purchase price, become taxable?"

In my opinion, the act referred to in your letter, to wit, Act No. 65, H. B. 57, approved March 2, 1939, does not in any way authorize the State of Alabama to tax lands owned in this State by the United States Government.

Congress has, however, given to the states the right to tax certain lands held or owned by the United States Government or its agencies in certain cases. The facts in your letter are not sufficient to advise me as to which act of Congress is applicable to the particular project to which you make reference. If you will secure this information and forward it to me, I will be glad to give you my opinion as to whether or not such land is subject to taxation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 19, 1939.

Hon. George Pearce,
Tax Collector,
Marion County,
Hamilton, Alabama.

Tax Collector held entitled to 2% on all collections made by him of drainage district taxes on State Drainage District No. 4, Marion County, Alabama.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 26, 1939, in which you request my opinion as follows:

> "I will appreciate your opinion with reference to what commission I am entitled to for collecting drainage tax.
>
> "I collect drainage tax on State Drainage District Number Four, Marion County, Alabama."

It is assumed that Drainage District No. 4 of Marion County, Alabama, is established and organized under the provisions of the constitutional amendment proposed by Acts 1927, page 346, adopted at the general election of 1928 (See **Sims v. Tigrett,** 158 So. 326) which validated the Drainage Act of 1915 (Act 1915, p. 157)). Cf. Opinion of Attorney General, Vol. II, p. 156.

By the 1915 Act provision was made for the levy and collection of special tax assessments for the purpose of carrying out the provisions of the act. These tax assessments are undoubtedly "special taxes" within the meaning of Section 161 of the General Revenue Act of 1935, as said section was amended by Act No. 325, H. B. 321, approved August 31, 1939, which provides:

> "He (the Tax Collector) shall also be entitled to receive two per cent on all collections made by him of special taxes, whether such special taxes be levied for the state or county, to be paid out of such special taxes."

See 17 American Jurisprudence 816, Sections 63, 64; also 25 R. C. L. 106, Section 24.

While it is true that the quoted provision of Section 161 contains specific reference to the special taxes levied "for the state or county", this fact would not, in my judgment, limit the generality of the preceding provision granting two per cent on all collections made by the Tax Collector of special taxes, for the reason that such phrase cannot be construed as a restriction upon the field of operation of the statute when read with the remainder of the quoted sentence.

You are, therefore, advised that you are entitled to two per cent for collection of drainage district taxes paid out of such taxes.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

October 19, 1939.

Hon. W. E. Butler,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Municipal Corporations—Dormant Municipalities (Code, 1750) — Reinstatement of corporate organization not authorized in absence of satisfactory evidence of original incorporation.

Mandamus proper remedy to compel Probate Judge to proceed under Code Section 1750, for reinstatement of dormant and inefficient municipal corporations.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion dated September 28, 1939, reading as follows:

"The New Hope Community has applied to the Probate Court under the provisions of Section 1750 Code of Alabama, 1923, by a petition apparently signed by a majority of the tax payers, for reinstatement of the corporate organization of the Town of New Hope.

"From the records of the Probate Court I find the following:

"Order to hold election under date of February 8th, 1900, Minute Book 26 Page 271.

An entry in Minute Book, January Term 1900, heading only, Minute Book 26 Page 266.

An entry in the February Term 1900, heading only, as follows: 'Town of New Hope Incorporated.'

An entry in Minute Book 31 Page 375 under date December 14, 1910, Reinstating the corporate organization of the Town of New Hope.

"I have determined from oral testimony that the Town of New Hope actually did function as an incorporated town for several years after the 1900 proceedings.

"Should this court entertain the petition currently filed for reinstatement under Section 1750? Would the decree of the Probate Court under date of December 14th, 1910, indicate that the Probate Judge at that time found that the Town of New Hope was a dormant municipality, either statutory or de facto, and, therefore, at that time entitled to reinstatement?

"Do you advise an order by the Probate Court reinstating the Town of New Hope, or would it be better for these people to proceed in this Court to dissolve whatever corporate organization there may be at this time, and then file new proceedings to incorporate?

"This matter presents an immediate problem, because if the petitioners are correct in their allegations, they would be entitled to an order of reinstatement; and upon reinstatement the Town of New Hope would be entitled to receive a participation in the collection of automobile license tags, and there would be a number of privilege licenses collected for the state and county on a different basis during the ensuing fiscal year.

"If you deem it to be advisable, during the time which you will need to give me a reply, I would be pleased to have your advice, either oral or in letter form, as to whether or not an arrangement should be made to collect privilege licenses as though New Hope were incorporated, retaining the difference over and above here in escrow, to avoid having to charge different rates for privilege licenses in the same locality in the same fiscal year, and either remitting to the state and county or refunding as the case may be, upon receipt of your sound opinion.

"Plain copies of the records above referred to are enclosed herewith."

The papers submitted along with your letter are in my opinion insufficient to show incorporation of the town in 1900 in the mode prescribed by law (Code 1896, Ch. 79, Ss. 2937 et seq.)

1. The petition to the Judge of Probate to order an election is fatally defective for failure to state with sufficient certainty or accuracy "the boundaries of the town proposed to be incorporated," as required by statute (Sec. 2937). The area to be incorporated is described by reference to the "lines" and property of certain named persons, so that location of the boundaries depends entirely on parol evidence to ascertain the property lines or boundaries of those persons.

The necessity of accurate description in cases like this is apparent from the requirements of subsequent statutes providing for incorporation of small communities upon adoption of the present so-called Municipal Code of 1907. (Code 1907, Sec. 1053), and requiring an accurate plat to be attached to the petition.

While it is true that no plat was required to be attached to the petition under the Code of 1896, a statement of the boundaries was necessary to be made by **written petition,** and the **statement** of attempted description requires parol evidence to aid the petition.

As the ambiguous description is patent in my opinion, parol evidence would be inadmissible to aid it, and the petition did not meet the requirements of the statute.

State ex rel. Allen et al. v. Town of Phil Campbell et al., 177 Ala. 204, 58 So. 905.

Another fatal defect, in my opinion, is failure of the petition to show that the town to be incorporated had a population of not less than 100 nor more

than 3,000, a condition necessary to incorporation under the statute under consideration.

Corporate existence was therefore subject to attack and the attempt at incorporation unavailing.

Phil Campbell case, supra;

West End v. State ex rel. etc., 138 Ala. 295 (1902)

2. The order of the Probate Judge fails to designate the place for holding the election, or the manner of notice to be given thereof.

There is no certificate of inspectors as to the result of the election, nor is there shown any entry of record that "the inhabitants of such town are incorporated by the name, and with the boundaries designated by the petition," as required by statute.

While under the Code of 1896, all action by the Probate Judge was ministerial merely in the matter of incorporation, the foregoing defects, in my opinion, raise such serious doubt as to the validity of the proceedings, and disclose such vulnerability to attack as to make it inadvisable to attempt under Section 1750 of the Code to reinstate the alleged corporate organization of New Hope as a "dormant and inefficient" municipality.

West End v. State, supra.

In response to your several inquiries:

1. I believe you should require the town to proceed by petition for mandamus in the matter of reinstatement so that the matter can be juridicially determined.

2. The proceedings for reinstatement indicated by the order of December 14, 1910, appointing a mayor and aldermen of New Hope to "hold office until the next regular election" (following the words of the statute then in effect, Code 1907, Sec. 1059) are immaterial to the present contemplated proceeding for reinstatement. The order of 1910 has no force or effect as a judgment because as pointed out in the West End case, the statute provides for no hearing upon the petition for reinstatement.

3. I do not advise an order reinstating the corporate organization of the town of New Hope.

4. I am of the opinion that the proper course of procedure is to institute new proceedings for incorporation, rather than attempt to proceed under Code, Sec. 1750.

5. For the foregoing reasons, I find no authority or basis for action on your part upon the theory or assumption that New Hope is a municipal corporation, either **de jure** or **de facto.** I am of opinion that you should require mandamus proceedings to test any questions raised as to corporate existence of New Hope.

From your statement of facts and papers submitted for examination, I see no basis for your conclusion that you "have determined from oral testimony that the town of New Hope actually did function as an incorporated town for several years after the 1900 proceedings."

The basis for the determination does not appear, and in the absence of record or documentary proof of municipal corporate action such as election of Mayor and Aldermen, levy and collection of taxes, minutes of meetings of the Board of Aldermen, etc., I am unable to see the materiality of your finding.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

October 19, 1939.

Hon. Frank N. Julian,
Superintendent of Insurance,
Montgomery, Alabama.

Insurance—Amounts due for licenses by fraternal benefit society, which has been doing business in this state for some time, that have accrued prior to five years are barred by statute of limitations.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of October 3, 1939, in which you request my opinion as follows:

"Recently we learned that the Police and Firemen's Insurance Association of Indianapolis, Indiana, a fraternal benefit society of Indiana, had been operating in this state, and upon making demand on the company for the proper license fee, we were advised that they had been operating under what they thought was an exemption. They claim to be operating under Section 8503 of the Code, which you will note exempts societies which admit to membership only persons engaged in one or more hazardous occupations in the same or similar lines of business. However, the latter part of said Section has a proviso reading as follows:

" 'But any such domestic order or society which has more than five hundred members * * * and which issues to any person a certificate providing for payments or benefits shall not be exempt by the provisions of this article.'

"Upon bringing the above quoted proviso to the attention of this association they admit and agree with us that the association is not exempt, see copy of their letter enclosed.

"We then suggested that in all probability it would be permissible to license the society provided they pay for five years back license, and to this they agree.

"Will you, therefore, advise us if it would be in order for us to accept five years qualification license and admit this association to transact business in the state.

"Please let us have as prompt response as possible as the matter is in suspense."

In answer to your inquiry, I am of the opinion that you may accept whatever amounts are due by the association in question that have accrued within the last five years and then permit said association to transact business in this state if other necessary requirements for qualification have been met.

The recovery of amounts due which accrued prior to five years are barred by the statute of limitations. **Section 8945(2) of the Code of Alabama, 1923; State v. Acacia Mutual Life Association,** 214 Ala. 631, 108 So. 759. Opinion of the Attorney General to President of the Public Service Commission on May 2, 1935 (copy enclosed). Therefore, any amounts due which have accrued prior to five years could not be collected.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

October 20, 1939.

Hon. W. H. Quillin,
Judge, Law & Equity Court.
Franklin County,
Russellville, Alabama.

Costs and fees—Act No. 156, S. B. 143, approved March 16, 1939 (General Acts 1939, Pamphlet p. 229), applies to violations of Act No. 198, S. B. 22, approved March 4, 1937 (General Acts 1936-37, p. 229), i.e., driving motor vehicle by habitual users of narcotic drugs and persons who are intoxicated, and no fee shall be taxed or collected for trial, solicitor's fees or entering judgment where defendant pleads guilty and no appeal is taken.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of October 7, 1939, requesting my opinion as follows:

"I thank you for your opinion dated October 5, 1939, relative to trial tax and solicitor's fees in cases in Law & Equity Court, wherein defendants plead guilty to passing a school bus in violation of General Act of 1935, page 240. I think that your opinion is sound.

"Act No. 198, approved by the Governor March 4, 1937, is also a separate and independent act. (General Acts 1936-1937, page 229). If a defendant pleads guilty in the Law & Equity Court to a charge of violation of said Act No. 198 approved by the Governor March 4, 1937, while he is intoxicated, should a solicitor's fee and trial tax be collected? I have in mind Act No. 156, approved by the Governor March 16, 1939.

"Please let me have your opinion."

I am of the opinion that your inquiry should be answered in the negative. Act No. 156, S. B. 143, approved March 16, 1939 (General Acts 1939, Pamphlet p. 229), in my opinion, applies to a violation of Act No. 198, S. B. 22, approved March 4, 1937 (General Acts 1936-37, p. 229). Act No. 156 of the 1939 Legislature, supra, provides in pertinent part as follows:

"Section 1. That in all misdemeanor cases for violation of the State Highway Code, the State Highway Patrol Act and the rules of the road cognizable in Justice of the Peace courts, courts created in lieu of Justice of the Peace courts, County Courts, Inferior Courts, Law and Equity Courts, or courts of like jurisdiction, where the defendant pleads guilty and no appeal is taken, no fee shall be taxed or collected in said courts for trial, solicitor's fees, or entering judgment in such cases."

Act No. 198 of the 1936-37, Legislature provides in pertinent part as follows:

"Section 1. It shall be unlawful for any person, whether licensed or not, who is an habitual user of narcotic drugs, or any person who is intoxicated, to drive any motor vehicle upon any highway of this state, and upon conviction shall be punished by imprisonment in the County or municipal jail for not more than one year or by fine of not less than One Hundred ($100.00) Dollars nor more than one thousand dollars or by both such fine and imprisonment in the discretion of the court trying the cause. As additional punishment the court trying the cause shall have exclusive authority to prohibit and must prohibit the person so convicted from driving any motor vehicle upon the public highways of this State for a period not to exceed one year. On a second or subsequent conviction he shall be punished by imprisonment at hard labor for not more than one year or in the discretion of the court a fine of not less than One Hundred ($100.00) Dollars nor more than one thousand dollars, or both, and in addition thereto the court trying said cause shall, as additional punishment, have exclusive authority to prohibit the person convicted from driving a motor vehicle upon the highways of this state for a period of not less than thirty days nor more than one year."

Our Supreme Court in the case of **Pharr v. Whittle,** 185 So. 898, held that the 1936-37 Act was intended as a substitute for Section 48 of the Highway Code of 1927 and that the provisions applicable to said Section 48 of the Highway Code of 1927 were equally applicable to the 1936-37 Act. Since Act No. 156, supra, is applicable to violations of the State Highway Code, including Section 48 thereof, it is equally applicable to Act No. 198, supra, as Act No. 198 is treated as a substitute for Section 48 of the Highway Code of 1927. (See Biennial Report of Attorney General 1936-38, p. 506)

Premises considered, it follows that cases for violation of Act No. 198 where the defendant pleads guilty and no appeal is taken, no fee should be taxed or collected for trial, solicitor's fee or entering judgment.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 21, 1939.

Hon. Alex Brantley, Chairman,
Board of County Commissioners,
Pike County,
Troy, Alabama.

Taxation—Costs of newspaper notices given by the Tax Assessor and Tax Collector calling attention of taxpayers to the provisions of law requiring delinquent fees to be paid on assessments and collections made after certain dates and explaining the items of personal property exempt from taxation and those subject to taxation, may not be paid by the county.

Dear Sir:

I have your letter of October 6, 1939, in which you request my opinion as follows:

"I will appreciate it very much if you will give me your official opinion of the following:

"1. Is the inclosed advertisement, published over the signatures of the Tax Assessor and Tax Collector of Pike County, a legal claim for payment against Pike County?

"The above referred to ads were published in the Troy Herald on the 14th day of September, and in the Troy Messenger on the 12th and 14th of September, 1939.

"2. Is the inclosed advertisement with reference to the assessment of taxes, but not signed by the Tax Assessor or the Tax Collector, a legal claim against Pike County for payment?

"As it is now the time to close the County's books for the fiscal year 1938-1939, I will appreciate it very much if you could give me a reply at your earliest convenience."

The newspaper notices enclosed with your letter of inquiry have been carefully examined. The first, which was signed by the Tax Assessor and Tax Collector, calls the attention of the taxpayers to the fact that delinquent fees must be paid on all assessments and collections made after certain dates and urges them to make their assessments and pay their taxes before those dates in order to avoid the payment of these delinquent fees, and the other, given by them, but not over their signature, explains to the taxpayers the items of personal property that are exempt from taxation and those subject to taxation and urges the taxpayers to make their assessments and pay their taxes in time to avoid the payment of delinquent fees.

The delinquent fees referred to in these advertisements are the fee of fifty cents to which the Tax Assessor is entitled by the provisions of Section 41 of the 1935 Revenue Act for making a demand after the 31st day of December in each year, upon a taxpayer who has failed to make return to him for a list of his taxable property, which he is required to do by said section, and the fee of fifty cents which the Tax Collector is authorized to charge by Section 162 of the 1935 Revenue Act for making, after the first day of January, a personal demand in writing upon the delinquent taxpayer for the amount of his taxes and fees, which he is required to do by Section 164 of the 1935 Revenue Act. The exemptions referred to in the second notice are those contained in our statutory law dealing with ad valorem taxation.

Although, no doubt, these notices will be of great benefit to the taxpayers of your county, and the Tax Assessor and Tax Collector, in giving these notices, may have rendered a public service to these taxpayers, I know of no requirement of law that they give such notices, and of no authority of law for the costs of such notices being paid by the county and, consequently, I advise you that the county is without authority to pay the same.

This holding is not to be confused with the holding of an opinion of this office rendered to Hon. B. M. Davis, Tax Assessor, Cherokee County, Centre, Alabama, and Hon. J. W. Graham, Tax Collector, Cherokee County, Centre, Alabama, under date of September 7, 1938, Quarterly Report of Attorney General, Vol. XII, page 173, Biennial Report of Attorney General, 1936-38, page 773, that the costs of the newspaper notices required to be given by the Tax Assessor and Tax Collector in accordance with the provisions of Sections 30 and 157 of the 1935 Revenue Act should be paid for by the county.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 21, 1939.

Hon. W. H. Faust,
Sheriff, Dale County,
Ozark, Alabama.

Sheriffs—

1. Sheriff not entitled to arrest fee where a person is arrested and placed in jail under the provisions of Section 1106, Code of Alabama, 1923, as amended.

2. Sheriff entitled to be paid for costs of feeding and keeping such a person, as provided for in Act No. 366, Senate Bill 116, approved September 12, 1939.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 4, 1939, requesting my opinion as follows:

"Where the County Health Officer issues a warrant to arrest and commit to jail for treatment for syphilis, how is the Sheriff paid for the arrest and for feeding?"

I assume that you are referring to a case where a person suffering with venereal disease refuses treatment and it is necessary for the health authorities to order him confined to jail until he is cured, under the provisions of Section 1106 of the Code of Alabama, 1923, as amended.

In answer to the first part of your inquiry as to whether or not you are entitled to an arrest fee under the facts set out in your letter, I refer you to an opinion of this office rendered on December 2, 1938, to Hon. M. H. Wilkins, Sheriff, Baldwin County, wherein it was held that no provision is contained in the laws of the state providing for payment of costs incurred in such cases.

It is my judgment that this opinion is still applicable and you are, therefore, advised that the only way in which you can collect an arrest fee is under the provisions of Section 7287, Code of Alabama, 1923, as amended by General Acts of 1931, page 261, which deals with ex officio fees allowed sheriffs.

The opinion above referred to, however, is not applicable to the second part of your inquiry, i. e., whether or not you are entitled to pay for feeding a person so held.

Section 1106, Code of 1923, as amended by Acts of 1927, page 716, has again been amended by Act No. 366, Senate Bill 116, approved September 12, 1939, by adding thereto the following words:

"Cost of feeding and keeping such person or persons shall be at the expense of the city in the event such person or persons resides in an

incorporated municipality, otherwise the same shall be at the expense of the county."

It is, therefore, my opinion that you are entitled to receive pay for the feeding of such a person, in accordance with the provisions above quoted.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 25, 1939.

Mrs. Marie B. Owen, Director,
Department of Archives and History,
Capitol.

The librarian of the W. P. A. library extension work may be appointed Director of the State Public Library Service Division and be compensated for said services.

Opinion by Assistant Attorney General Russell.

Dear Madam:

I have your request for official opinion dated October 20, 1939, which reads as follows:

"Governor Dixon has called a meeting of the Executive Board of the Public Library Service Division to meet in his office Wednesday, October 25th, at 11 o'clock, to officially organize. After organization, problems concerning the operation of the Division will be determined.

"You will recall that in the Executive amendment to the free textbook appropriation, it was provided that the Public Library Service Division should be given $10,000 out of the $200,000 appropriated to the Department of Education for free textbooks. The first allotment of $10,000 is now in the State Treasury. The Executive Amendment also stipulated that this appropriation was not available unless matched with Federal money. Miss Mary Weber, administering certain W. P. A. funds for library extension through that agency, has agreed to pay all the personnel employed in library extension work.

"The question I wish to ask you is: Will it be legal for the State to contribute a very small amount, say $1.00 per year, towards the joint library director's salary, thereby making her an employee of the State. There are certain rules and regulations governing W. P. A. procedure that does not permit one of their employees to make or approve expenditures to be paid for by the State. For that reason the joint library director of both agencies must be a State employee as well as a W. P. A.

employee. The employment of a director is necessary in order to meet the provisions of the Act approved March 17, 1939, authorizing the creation of the Public Library Service Division in the Alabama State Department of Archives and History.

"May I call your attention to the fact that several heads of Departments are paid jointly by the State and the Federal Government. I would like this opinion promptly in order to present it to the Board at its meeting on Wednesday, the 25th."

In further reference to your above inquiry, you advised us in a personal conversation of the following additional facts: (1) That Mrs. Mary Weber has appointed a librarian for the W. P. A. library extension work whose salary is paid with W. P. A. funds. (2) That it is the desire of the Executive Board of the State Public Library Service Division to appoint as the Director of the Public Library Service Division the same person who was appointed by Miss Weber as librarian for the W. P. A. library extension work.

Therefore, the exact question presented is whether it is legal for the duly appointed librarian of the W. P. A. library extension work to be appointed director of the State Public Library Service Division and act as joint library director for both agencies and receive in addition to her salary as a W. P. A. librarian a nominal sum from the State for her services as State Director?

In answer to your inquiry, attention is directed to Section 280 of the Constitution of Alabama, 1901, and to Section 2575(7) of the Code of Alabama, 1923.

Section 280 of the Constitution is as follows:

"280. No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars, shall during his continuance in such office hold any office of profit under this State; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this State, except justices of the peace, constables, notaries public and commissioners of deeds."

Section 2575(7) of the Code is as follows:

"2575(7). No person holding an office of profit under the United States, shall, during his continuance in such office, hold any office of profit under this state; nor shall any person hold two offices of profit at one and the same time under the state, except notaries public."

It will be noted that Section 280, supra, provides that "no person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars, shall, during his continuance in such office, hold any office of profit under the State." This same provision also appears in Section 2575(7) of the Code, supra. These two sections of the Constitution and Code respectively are the only inhibitions against a person holding a position with both the Federal and State governments at the same time and receiving compensation for such services from both sources. The question is now presented, whether or not the W. P. A. extension librarian,

if appointed Director of the State Public Library Service Division would fall within the inhibition of these two sections, supra. I think not. As heretofore noted, Section 280, supra, provides that no person shall hold an "office of profit" with the United States while holding an "office of profit" with the State. The question as to what constitutes an "office of profit" within the meaning of Section 280, supra, has often been passed upon by the Supreme Court of Alabama. In the case, **The State v. Sanders,** 187 Ala. 79, 65 So. 378, the question arose as to whether a state health officer was occupying an office of profit within the constitutional prohibitions. The Supreme Court in holding that a State health officer was not an officer within the constitutional prohibitions said:

> "The Board of Health may employ the State health officer for a day, a week, a month, or a year. The statute does not fix his term of office nor his salary or compensation. It is apparent he is not occupying an office of profit."

As pointed out in an opinion of this office to Messrs. Lucien C. Brown and James A. Lipscomb, Associate Commissioners, Alabama Unemployment Compensation Commission, Quarterly Report of Attorney General, Vol. X, page 79, the Supreme Court of Alabama in the case of **State ex rel. Howe v. Wilkinson,** 124 So. 213, 220 Ala. 38, and **State ex rel. Glenn v. Wilkinson,** 124 So. 211, 200 Ala. 172, set at rest all doubts as to what constitutes an "office of profit" within the purview of Sections 280 and 2575(7), supra. In both of the cases mentioned quo warranto proceedings were filed, seeking the ouster of Horace Wilkinson as Assistant City Attorney of Birmingham and as Sheriff's Attorney of Jefferson County, the basis of both actions being that Wilkinson occupied at one and the same time two offices of profit as prohibited by Section 280 of the Constitution. The Supreme Court of Alabama held that the appointment as Sheriff's Attorney was not an "office of profit" but was employment. The court said:

> "The sheriff employs the attorney, he is an employee of that official" and again, "We think it clear that the Assistant City Attorney is an employee and does not hold an office of profit. It is just as plausible to content that the City Engineer, the Health Officer, or Municipal Surgeon are holding offices of profit under the State."

From a reading of the authorities heretofore cited it will be noted that the Supreme Court in defining the term "office of profit," has consistently taken the position that unless an appointment conveys, as a necessary incident to its exercise, some part of the sovereign power of the State, the term and salary of prerequisites of which are prescribed by law, such appointment is not an "office of profit" within the purview and meaning of Section 280, supra. Applying this interpretation to the position of Director of Public Library Service Division of the State of Alabama, we look to Act No. 171, H. B. 327, approved March 17, 1939, which said Act created said Public Library Service Division in the State Department of Archives and History and particularly to Section 4 of said Act, which is as follows:

> "Section 4. OFFICERS. The members of the Executive Board shall elect from its membership a chairman and a vice-chairman. The Board shall appoint a Director who shall be a graduate of an accredited Library School, shall have had a minimum of three years of library experience in an administrative capacity, and who is not a member of the Executive Board. Such other trained members of the Staff of the Division shall be

appointed by the Executive Board on the nomination of the Director of the Division as well as such other assistants as will be deemed necessary in carrying out purposes of this Act. The Director shall keep a record of the proceedings of the Division; shall keep accurate accounts of all financial transactions of the Division; shall have charge of its work in organizing new libraries and improving those already established and in general perform such duties as may from time to time be assigned by the Executive Board. In addition to their salaries, the Director and the assistants shall be allowed their actual expense while absent from the Division office in the service of the Division."

It will be noted from a reading of the above section that the Director provided for therein is appointed by the Executive Board and is required to perform such duties as may from time to time be assigned by said Board; that the Director is endowed with no part of the sovereign power of the State, has no fixed term of office or salary but holds office at the pleasure of the Executive Board, which Board in turn fixes the salary of the Director and prescribes the duties to be performed by said employee.

It is, therefore, my opinion that the position of Director of the Public Library Service Division is not an "office of profit" within the inhibitions of Section 280 of the Constitution, supra, and therefore could not be within the inhibitions of Section 2575(7) of the Code, supra, as such section is but a legislative declaration of the provisions of Section 280 of the Constitution, supra. **State ex rel. Thomas v. Gunter,** 170 Ala. 165, 54 So. 283.

Without deciding whether or not the librarian of the W. P. A. library extension work holds an "office of profit" with the United States, it follows that since the position of Director of the Public Library Service Division in the State Department of Archives and History is not an officer within the purview of Section 280, supra, the same person may act in both capacities at the same time. It therefore follows that if the librarian of the W. P. A. library extension work is appointed Director of the Public Library Service Division, the State may compensate said Director for such services.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 25, 1939.

Hon. J. S. Benson,
Judge of Probate,
Jackson County,
Scottsboro, Alabama.

Filing Tax—Under facts stated, instrument conveying interest in real property, and/or containing a security for debt, is subject to a tax as provided by Schedule 94 of Section 348, General Revenue Acts of Alabama, 1935.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion under date of August 25, 1939, reading as follows:

> "I am enclosing original instrument as filed in this office for record, for which I will greatly appreciate an opinion on as to the tax required on same. Please render me an opinion on this as quickly as possible and return instrument to me."

I am of the opinion that the instrument in question is subject to the license or privilege tax imposed by Schedule 94 of Section 348 of the General Revenue Act (Acts 1935 at page 477), imposing a tax upon certain instruments when offered for record in the office of the Judge of Probate.

The document submitted by you purports to be an agreement for the purchase and sale of land, the purchase money being payable in annual installments over a term of years, with provision that upon payment in full of the purchase money title shall vest in vendee, and further provision that upon payment of the first installment vendors will convey to vendee and accept a mortgage to secure the balance of unpaid purchase money.

The other provisions of the instrument creating the relation of landlord and tenant between the parties and the covenants of vendees to pay rent, taxes and insurance, pending execution of a deed or of a deed and mortgage, do not affect the character of the instrument as a conditional sale.

> " * * * When there is a contract of sale of real or personal property by which either the title is reserved in the vendor as security for the debt, or by which the title passes and what is known as a lien is reserved for that purpose, and such instrument is offered for record, there is due to be paid both the mortgage tax and the deed tax as provided in Schedules 94 and 46 respectively, i.e. of the 1935 General Revenue Act."

Thompson, Pro. J. v. Smith, (1937). 235 Ala. 409, 174 So. 797.

In addition, the act itself (page 479) expressly provides:

> "The tax herein provided for shall be paid upon all contracts for the sale of real or personal property whether the same be in the nature of a conditional sale or a bond for title, and no such contract shall be received for record until such tax shall have been paid."

See also Quarterly Report of Attorney General, Vol. XIII, page 109.

The original submitted for examination is herewith returned.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

October 25, 1939.

Dr. A. H. Collins,
State Superintendent of Education,
Montgomery, Alabama.

Schools—World War Orphans—

1. Child of soldier, sailor or marine who was killed in action or died as a result of service in the World War and who has no permanent residence, held entitled to the benefits of the General Acts of 1931, page 775, while attending a State institution.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of September 27, 1939, in which you request my opinion as follows:

"A situation has arisen concerning certain provisions of Act No. 640, approved August 1, 1931, entitled: 'To provide educational opportunities for children of soldiers, sailors, and marines who were killed in action or died as a result of service in the World War.'

"The guardian of an eligible World War orphan has inquired of this office, if the person under his guardianship will be eligible to any benefits of the World War Orphan Scholarship Fund while in attendance at the Tuskegee High School, a public high school for negroes. The boy has been enrolled in Tuskegee Institute in the past and, of course, was not eligible under previous rulings of the Attorney General so long as the high school was a part of Tuskegee Institute.

"Since the death of the boy's mother, the guardian has informed this office that it has been necessary in the past to send him to a boarding school as he had no home. During this time he has stayed with relatives in Birmingham, at Brown's Station in Dallas County, and, as stated above, has been kept at Tuskegee in the boarding department of the Institute during the school term.

"In light of the above will you kindly advise:

"1. If board and room rent may be paid for this boy while in attendance at the public high school in Tuskegee?

"2. Must the guardian of the boy establish his residence in Dallas County or in Birmingham before he will be entitled to any of the provisions of the Act?

"3. If residence is established in Dallas County or in Birmingham will he be required to attend high school in the county of his residence to receive any benefits of the Act?

"4. Should the County Board of Education in Macon County be required to admit this boy without the usual fees, since his residence is not in Macon County?

"This office assumes that his books and necessary supplies may be paid in whatever high schools he may wish to enroll."

In reply, I wish to advise you that I prefer to answer your second question first. In reply to this question, I wish to refer you to the provisions of the 1931 Act referred to by you which controls the answer to your inquiry. I refer to Section 1 of the General Acts of 1931, page 775, which provides as follows:

"Section 1. The sum appropriated under the provisions of this act shall be used for the sole purpose of providing for matriculation fees, board and room rent and books and supplies for the use and benefit of the children not under sixteen and not over twenty-one years of age and who have for twelve months had their domicile in the State of Alabama, of those who were killed in action or died from other cause during the World War, from April 6, 1917, to July 2, 1921, while serving in the Army, Navy or Marine Corps of the United States or as a result of such service; which children are attending or may attend a state educational or training institution of a secondary or college grade. Said children shall be admitted to state institutions of secondary or college grade free of tuition."

You will note that this section demands that the beneficiaries named must have had twelve months domicile in the State of Alabama. In my judgment, the child named by you is entitled to the benefits offered by the provisions of this act if he has had a continuous domicile in Alabama for a period of twelve months prior to the date such benefits as are promised by the above named act would accrue to him upon his application. No specific county domicile or residence is required.

Your question is to some extent ambiguous, but I presume that you refer only to the ward, who is a boy, and not to the guardian. The guardian is not mentioned by the act and no consideration need here be given him insofar as residence requirements are concerned. In my judgment, the law here considered contemplated that a student may leave his permanent domicile in one part of the state and spend the scholastic year in another part of the state in the pursuit of his education. It is therefore my judgment that domicile in Alabama for twelve months prior to the date benefits would accrue upon his application is sufficient to meet the demands of the above quoted General Act of 1931, page 775.

In reply to your question numbered one, I wish to refer you to Section 2 of the General Acts of 1931, above cited, which provides as follows:

"Section 2. The amounts that may be or may become due to any educational or training institution, not in excess of the amount specified in section three hereof shall be payable to such institution from the fund hereby created on vouchers approved by the State Board of Education. Said Board shall determine the eligibility of the children who may make application for the benefits provided for in this act; satisfy itself of

the attendance of such children at any such institution and of the accuracy of the charge or charges submitted to said Board by the authorities of any such institution, on account of the attendance thereat of any such children. Provided, that no member of said Board or the Secretary shall receive any compensation for such services."

You will note that the above quoted provisions of law provide for board and room rent while attending a State educational institution of secondary or college grade. In my judgment, these requirements are met by your statement of facts and an affirmative answer is compelled.

In answer to your questions numbered 3 and 4 I wish to advise that in my judgment the question of residence is immaterial to your statement of facts when considered with the provisions of the General Acts of 1931, p. 775, as above quoted.

You ask whether or not this child shall be admitted to the public schools of Macon County without the usual fees. I wish to refer you to the last sentence of Section 1 of the General Acts of 1931, page 775, supra, as follows:

"Said children shall be admitted to state institutions of secondary or college grade free of tuition."

I wish to further refer you to Section 2 of the above named act, quoted supra.

Premises considered, it is my judgment that he should be admitted without tuition charge, but that the school authorities are entitled to charge such fees as are collected from other students.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 25, 1939.

Hon. Henry B. Foster,
Judge, Sixth Judicial Circuit,
Tuscaloosa, Alabama.

Court reporters—There is no authority of law for appointing a special court reporter for a circuit court except as provided by Section 6737, Code of Alabama, 1928 (Michie), and this appointment must be on account of sickness or other cause making the reporter unable to take the testimony at any trial.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 11, 1939, in which you request by opinion as follows:

"The dockets of the Tuscaloosa County Circuit Court are badly congested, and it has been necessary for me during several weeks of the present year to have assistance from other Circuit Judges. While they are here, it is necessary to have two Court Reporters. I have had to pay, personally, $5.00 a day for these special Court Reporters. Of course it saves the County considerable money to have two divisions of the Court running at one time, because more jurors may be kept busy all the time in this way.

"I am asking if you cannot find some provision of the law by which the County will be justified in paying this expense of the Special Court Reporter. I have had to pay a special Court Reporter for last week, and will have to pay one for next week. I do not feel that this is fair to me, but I have done this in order to dispose of the business of the Court to the best advantage.

"It is going to be necessary for me to have assistance in Tuscaloosa Circuit Court from time to time, and I must get some solution of this question. There is entirely too much business in this Circuit for one Judge. I disposed of 757 cases in the first six months of the present year. I have been working very hard all the year, and the dockets are still congested. I feel that I cannot afford to let the criminal dockets get too badly congested.

"I will thank you very much for your advice in this matter."

I am unable to find any provision of law, or construction of law which authorizes the county to employ and pay a court reporter under such circumstances as you describe in your statement of facts.

Section 6733, Code of Alabama, 1928 (Michie), provides for a court reporter, appointed by the judge, to perform the duties of official court reporter of the courts in the various circuits of Alabama. This section is as follows:

"6733. Appointment of court reporter; duties, term of office, removal.—Each of the judges of the circuit courts of this State shall appoint a competent shorthand reporter to perform the duties of official court reporter of the courts in the circuit over which said judge presides. No two or more judges shall appoint the same court reporter. No person shall be appointed official or special court reporter under the provisions of this article who is not able to correctly report in shorthand the proceedings in all trials as the same may occur and neatly and expeditiously transcribe on the typewriter testimony taken by him. Said official court reporter shall be an officer of the court, and within his circuit shall have power to administer oaths, and shall hold office at the pleasure of the judge, who shall have power to remove said official court reporter at any time. The court reporter shall not be related to the trial judge within the fourth degree of consanguinity or affinity, and any appointment of a court reporter so related to the trial judge within the prohibited degree shall be void. The provisions of this article shall not apply to circuits which consist of only one county and have three or more than three judges."

Then, again, Section 6737, Code of Alabama, 1928 (Michie), provides for special court reporters in cases of sickness or other cause when the regular reporter is unable to act, and is as follows:

"6737. Special reporter; appointment of.—Should the official court reporter herein provided for, on account of sickness or other cause be unable to report the testimony of any trial as provided in this article, the judge of the court may appoint a special reporter to serve until the official court reporter **can resume his duties in such court,** the compensation of such special reporter to be the same and paid in like manner as herein provided for official court reporters. In circuits having two or more judges, the court reporter shall, when not engaged in the discharge of his official duties, be subject to the direction of any judge of such circuit, it being the intention and purpose of this provision to avoid the necessity of appointing a special reporter whenever any official court reporter of the circuit is available." (Emphasis supplied)

It is true that the above quoted section says, among other things, "on account of sickness or other cause, be unable to report the testimony." The phrase "or other cause," it may be contended, makes provision for just such a contingency as exists here, but I do not so construe it. I think this is clear from the language of this section where it says, **"special reporter to serve until the official court reporter can resume his duties in such court."** (Emphasis supplied) In your statement of facts, it appears the regular court reporter has never relinquished his duty as such reporter, but is engaged all the while in one division of the court. Therefore, it is not a question of his being sick or otherwise unable to report the testimony of any trial, but it is just the fact that he is unable to act in two branches of the court at one and the same time. Therefore, it is my opinion that there is no authority of law for either the county or the State paying for such additional court reporter.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 25, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Taxation—Filing Tax—Deeds.

Deeds executed for a nominal consideration for the purpose of perfecting the title to real estate, are exempt from filing tax under Schedule 46 of the 1935 Revenue Act.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of September 18, 1939, in which you request my opinion as follows:

"There was presented to me this morning a Warranty Deed dated and acknowledged as of September 12, 1939, with the following description:

"'The Southwest quarter of the Southwest Sec. 17, Township 18 North, Range 21 East. This deed is made for the purpose of perfecting title to the above land into Bart Rogers, I, J. B. Anderson having heretofore conveyed the above land by warranty deed to D. J. Taylor about the 1 day of November, 1900 and my warranty herein is limited to my title at the time of said above conveyance. Said former deed is lost or destroyed.'

"The Deed referred to above has never been recorded. Please advise whether or not Deed Tax is due on this deed that is being presented to me for record now."

Upon request for further information as to the facts presented in the above transaction, on October 19, 1939 you wrote:

"With reference to your letter October 16, 1939, I wish to advise that the property in question was conveyed from Anderson to Taylor by the deed that was never presented for record. Taylor then conveyed this property to someone else and later this was conveyed to Rogers. The deed from Anderson to Rogers is to connect the chain of title to Rogers."

You are advised that in my opinion, based on the facts now before me, that the deed offered for record is not subject to the record filing tax levied by Schedule 46 of Section 348 of the 1935 Revenue Act (General Acts 1935, page 356), which, as here pertinent, provides:

"Schedule 46. Deeds, bills of sales, etc. No deed, bill of sale or other instrument of like character which conveys any real or personal property within this state, or which conveys any interest in any such property, except the transfer of mortgages on real or personal property within this State upon which the mortgage tax has been paid, **deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate,** and deeds and other instruments or conveyances, executed prior to October 1, 1923, shall not be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record to-wit:"

It will be noted from the above that instruments and deeds executed for a nominal consideration for the purpose of perfecting the title to real estate, are exempt from the payment of the filing tax imposed for Schedule 46, supra.

I call your attention to the case of **Hawkins, Probate Judge vs. Pure Oil Company,** 232 Ala. 660, 169 So. 307, in which case the Supreme Court, in discussing Section 21½ of the 1927 Revenue Act, which section was brought forward in the 1935 Revenue Act as Schedule 46, speaking through Justice Gardner, said:

"It is a matter of general knowledge that in abstracting titles to property, and in making sales, and settling estates numerous defects appear which should be corrected on the record, and the owner, though having possession and title, is required to perfect the record title, and

deeds are oftentimes required for this purpose. They are based upon a mere nominal consideration, and usually serve to correct a technical error or defect in the title, or perhaps some matter of description. We attempt no exact statement of the extent or limitations of this exception, but merely observe that its general purpose had reference to some such situation as thus outlined."

I am, therefore of the opinion that the deed offered for record is not a deed whereby Rogers acquired title to the real estate in question, but as a deed executed for the purpose of perfecting the title to real estate, and comes within the exemption granted by Section 46, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 25, 1939.

Hon. A. C. Polk, Chairman,
State Board of Registration for
Professional Engineers and Land Surveyors,
1117 Web Crawford Building,
Birmingham, Alabama.

Engineers' Registration Law (General Acts, 1935, page 661, No. 271)—

A firm or corporation engaging in the practice of professional engineering or land surveying, may not have "in responsible charge of such practice" a person not qualified to practice the profession of engineering or land surveying under the provisions of the act, but must have "in responsible charge of such practice" a person qualified to engage in the practice of professional engineering or land surveying under the provisions of the act.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion under date of October 17, 1939, which reads as follows:

"Act No. 271, Alabama General Laws, Regular Session 1935, commonly referred to as the Engineers' Registration Law, provides that any person practicing, or offering to practice the professions of engineering or land surveying shall be required to submit evidence that he is qualified so to practice, and shall be registered by the Board created by the provisions of the Act and in accordance with the provisions set forth for the registration of Engineers and Land Surveyors.

"Section 12, of said Act, gives the requirements for registration of individuals. Section 20, of said Act, provides for the exemption of certain persons and stipulates the conditions under which they are exempted.

"Section 17 of the Act reads as follows:

" 'FIRMS, PARTNERSHIPS AND CORPORATIONS.—A firm, Corporation or Partnership may engage in the practice of professional engineering or land surveying in this State, provided the person or persons connected with such Firms, Corporations or Partnerships in responsible charge of such practice is or are registered as herein required, or is or are otherwise authorized to practice as provided in Section 20 of this Act. The same exemptions shall apply to firms, corporations and partnerships as apply to individuals under this Act.'

"I am authorized by this Board to write you for a ruling on a Corporation practicing in this State.

"John Doe and Richard Roe organized a firm with headquarters in Washington, D. C., and in Alabama, under the following firm name,

Doe and Roe
Engineering and Financial Consultants

"John Doe is a non-resident of the State of Alabama, but is a registered Professional Engineer authorized to practice in this State.

"Richard Roe is not an Engineer and, therefore, is not qualified to practice engineering. Richard Roe is at the present time a resident of Alabama and is representing the firm in its business transactions, and in soliciting contracts. His general activities in connection with the said firm of Doe and Roe is of such a nature that he is referred to as the 'Engineer' in charge of the project by newspapers and periodicals and is generally regarded in the community as the Engineer having charge of the engineering project which the firm of Doe and Roe is engaged in building.

"In addition to Joe Doe there are other Engineers employed by said firm of Doe and Roe who have been registered and authorized to practice engineering in this State. The said registered engineers employed by the firm report to Richard Roe, receive all instructions from said Richard Roe and regard him as the man in responsible charge of the engineering project on which the firm of Doe and Roe is engaged.

"The Board desires a ruling from you on the following question:

"Can Richard Roe actively represent the firm of Doe and Roe in this State in its engineering practice, making investigations, reports and estimates on projects requiring the application of engineering principles and data; solicit engineering contracts for projects on which the reports and estimates were made; actively direct the construction work on the project, receiving reports from, and giving instructions to, the field engineers engaged on the project and otherwise so conduct himself so as to leave the general impression that he is an engineer and be exempted

from the provisions of the Act requiring the registration of professional engineers by virtue of his being a member of the incorporated firm, above referred to?"

This office is not prepared to pass upon what constitutes engaging in the practice of professional engineering or land surveying. That is, of course, a question of fact, the determination of which depends upon the facts in each particular case.

Consequently, I respectfully decline to express an opinion as to whether or not the person connected with the firm or corporation described in your letter of inquiry and conducting himself in the manner therein detailed, is engaging in the practice of professional engineering or land surveying.

It is my opinion, however, that a firm or corporation engaging in the practice of professional engineering or land surveying who has a person not qualified to practice the profession of engineering or land surveying, under the provisions of Act No. 271, General Acts, 1935, page 661, in "responsible charge of such practice" would be violating the provisions of said act. It is further my opinion that in order for such a firm or corporation legally to engage in the practice of professional engineering or land surveying there must be "in responsible charge of such practice" a person or persons qualified under the provisions of Act No. 271, supra. (See particularly Section 17 thereof, set out in your letter of inquiry). Cf. opinion this day rendered to you.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 25, 1939.

Hon. A. C. Polk, Chairman,
State Board of Registration for
Professional Engineers and Land Surveyors,
1117 Webb Crawford Building,
Birmingham, Alabama.

Engineers Registration Law (Act No. 271, General Acts, 1935, page 661)—

A person, not qualified for registration nor exempted therefrom under the Act, may not, by forming a corporation and employing qualified or exempted subordinates, engage in the practice of engineering and/or land surveying.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion under date of October 17, 1939, which reads as follows:

"Act no. 271, Alabama General Laws, Regular Session 1935, commonly referred to as the Engineers' Registration Law, provides that any person practicing, or offering to practice the professions of engineering or land surveying shall be required to submit evidence that he is qualified so to practice, and shall be registered by the Board created by the provisions of the Act and in accordance with the provisions set forth for the registration of Engineers and Land Surveyors.

"Section 12, of said Act, gives the requirements for registration of individuals. Section 20 of said Act provides for the exemption of certain persons and stipulates the conditions under which they are exempted.

"Section 17, of the Act, reads as follows:

" 'FIRMS, PARTNERSHIPS AND CORPORATIONS.—A Firm, Corporation or Partnership may engage in the practice of professional engineering or land surveying in this State; provided the person or persons connected with such Firms, Corporations or Partnerships in responsible charge of such practice is or are registered as herein required, or is or are otherwise authorized to practice as provided in Section 20 of this Act. The same exemption shall apply to firms, corporations and partnerships as apply to individuals under this Act.'

"I am authorized by this Board to write you for a ruling on a Corporation practicing in this State.

"John Doe was engaged in the practice of engineering in Alabama under his individual name until his attention was called to the law requiring the registration of engineers. Upon investigation John Doe found that he did not have the necessary technical requirements to qualify under the provisions of the Act. In order to continue his practice without registration he formed a Corporation under the title 'JOHN DOE, INCORPORATED, CONSULTING ENGINEERS.' He is now engaged in making surveys, preparing maps, securing rights-of-way, assisting in forming Cooperative Authorities, acting in advisory capacity in the preparation of estimates, obtaining of contracts and rendering engineering service and advice during the construction of projects requiring the principles of engineering practice.

"John Doe has employed certain men to assist him, who are qualified engineers and have been registered by this Board.

"The Board desires a ruling from you on the following question:

"Can John Doe continue the active practice of engineering by virtue of having incorporated his name and be exempted from the provisions of the Act by virtue of Section 17, above referred to?"

As I construe your inquiry, it requires an answer only to the question of whether or not, under the facts set out therein, a person who is unable to qualify as a professional engineer or land surveyor under the provisions of Act No. 271, General Acts of 1935, page 661, can engage in the active practice of a professional engineer or land surveyor by becoming one of the incorporators of a corporation of consulting engineers.

In my judgment, your question must be answered in the negative. It is a well known maxim of law that a person may not do indirectly that which he is forbidden to do directly. **Johnston v. State,** 16 Ala. App. 425, 78 So. 419; **In re: Opinion of the Justices,** 225 Ala. 502, 144 So. 111.

I do not mean to say, however, that such a person cannot be connected with such a corporation engaged in the practice of professional engineering or land surveying. However, it would be necessary for such a corporation, in order to comply with the provisions of Act No. 271, supra, to have "in responsible charge" of the practice of "professional engineering or land surveying" a person or persons qualified to engage in the practice of processional engineering or land surveying under the provisions of said act. (See particularly Section 17 thereof, set out in your letter of inquiry).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 25, 1939.

Hon. W. B. Riley,
Supt. of Education,
Macon County,
Tuskegee, Alabama.

Schools—Insurance—

County board of education authorized to insure school building, which is used by it as part of the public school system, although said building was deeded to the trustees of the school.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of October 10, 1939, requesting my opinion as follows:

"There is a school building in Macon County deeded to the trustees of the school.

"Does the County Board of Education have authority to insure the building and pay premium out of public school or District funds?

"Should the trustees, County Board of Education, or the State of Alabama, be named in the policy as the insured?"

Your inquiries will be answered on the assumption that the school building is being used by the county board of education as part of the public school system.

On the above assumption, it is my opinion that the county board of education has such an "Insurable interest" in the school building as to authorize it to insure same.

Section 134 of the School Code of 1927 provides as follows:

"134. Insurance on Schools.—The County Board of Education is charged with the duty of seeing that every school building whose title is vested in the State, County or school district is insured for its insurable value, and to this end may use a part of the proceeds of incidental fees, district tax levies, or such other funds as may be specifically set apart for such purpose by the County Board of Education.".

Section 95 of the School Code of 1927 provides as follows:

"95. Property vested in County Board.—All the property, estate, effects, money, funds, claims and donations now or hereafter vested by law in the public school authorities of any County for the benefit of the public schools of any County, hereby transferred and vested in the County Board of Education, and their successors in office. Real and personal estate granted, conveyed, devised or bequeathed for the use of any particular County, school district, or public school, shall be held in trust by the County Board of Education for the benefit of any such county school district or school."

Construing these two sections in pari materia, it follows that the county board of education has such an "insurable interest" in the building as to authorize the carrying of insurance on same. Section 134, supra, provides for the payment of the premiums from a part of the proceeds of incidental fees, district tax levies or such other funds as may be specifically set apart for such purpose by the county board of education. Biennial Report of Attorney General, 1926-28, p. 609. It must be understood that in order for the premium to be paid out of the district tax it is essential that the schoolhouse in question be used exclusively for the benefit of the school district that pays the tax. Opinion to J. H. Johnson, County Superintendent of Education of Dale County, rendered on March 28, 1931. Section 8542 of the Code of Alabama of 1923, as amended by Acts 1936-37, page 206, dealing with the State Insurance Fund, has no application as same applies only to State-owned property.

Since the insurance is to be taken out by the county board of education, it is my opinion that that body should be named in the policy as the insured.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 25, 1939.

Hon. Harry E. Smith,
Sheriff, Jefferson County,
Birmingham, Alabama.

Seizure fees—

1. Seizure or informer's fee provided for is payable by the State on the delivery of the convict to the State penitentiary authorities.

2. When a defendant has been placed on probation as to sentence or fine and costs under the act approved August 24, 1939, S. B. 198, the fees and costs of court are payable by the State under Section 8 of what is known as the Probation Act.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 19, 1939, in which you request my opinion as follows:

"Please inform me in regard to the seizure fees in distilling cases. Whether or not the fee becomes payable upon conviction to the deputies who make the arrest or will it be necessary for him to serve a certain amount of his time before this will be paid.

"We are informed that there is such a letter out to the Sheriffs, however, this office has not received a copy thereof.

"Also please forward to us what disposition will be made of these fees where a person had been placed on probation by the trial judge."

In answering the two questions which you present in your request, I am presuming that you have reference in both of them to the $25.00 informer's fee as set out by Section 4659 of the Code of Alabama, 1923, as amended by an act approved April 20, 1933, General Acts, 1933, page 200, as this fee is applicable in distilling cases, and there being no such fee as a "seizure fee" in such cases.

In answer to your first question, this office has repeatedly held that before any costs are paid by the State the defendant must have been delivered to the Convict Department to begin his sentence, and this is true as to this particular fee as the law requires that this fee must be taxed and collected as a part of the costs. See Section 4659 of the Code of Alabama, 1923, supra. However, this fee is not paid along with the other costs, but is paid by a separate voucher made direct to the person shown by the certificate of the presiding judge to be entitled to the same. This fee goes to the informant who may be an officer of the law or a private citizen. What I say above has reference to cases where the defendant is sentenced to the penitentiary and serves his sentence and does not apply to cases where the defendant is placed on probation by the judge under the recently enacted Probation Act.

In answer to your second question, I call your attention to Section 8 of an act approved August 24, 1939, S. B. 198, Simpson, which act provides for a system of probation in the State of Alabama. Said section is as follows:

"Section 8. Any provision of law to the contrary notwithstanding allowances, costs and fees of officers of courts and of state witnesses in any cases in which sentence is suspended and the defendant put on probation, shall be paid in the same manner and from the same funds or sources as if no suspension of execution of sentence had intervened."

If the judge, in granting probation to a person convicted of crime, does not require such person to pay the costs, in other words, grants probation as to costs, then, in that event, the State pays the costs, as provided by Section 8, supra.

See opinion of this office written October 7, 1939, to Hon. William A. Conrad, Clerk, Circuit Court, Mobile County, a copy of which opinion was recently mailed to you by this office.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 25, 1939.

Hon. E. W. Vance, Member,
Board of Revenue,
Barbour County,
Eufaula, Alabama.

Senate Bill 357, approved September 6, 1939, complies with Section 106 of the Constitution of 1901 and is a valid enactment.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of October 13, 1939, in which you request my opinion as follows:

"As a member of, and by direction of the Board of Revenue of Barbour County, we are submitting to you for an official opinion the following statement of facts:

"John B. Laseter, as Sheriff of Barbour County, Alabama, in the years 1919, 1920, 1921, had certain claims against the 'Fine and Forfeiture Fund of Barbour County' occurring in his favor as Sheriff of Barbour County amounting to a total of $389.50, which were duly itemized

and sworn to by said Laseter, and presented by him to the Clerk of the Board of Revenue of Barbour County, and were by said Clerk of the Board duly filed and registered as required by the then existing law.

"Said Laseter died in Barbour County in the year 1932, intestate, there was no administration upon his estate, and no minor children, but left surviving his widow Mrs. Lucenda Laseter. The personal property left was less in value than the amount allowed by law to the widow as exempt. These claims were never paid.

"There was a local bill introduced and passed by Senator Clayton of Barbour County through the recent session of the Legislature authorizing the Board of Revenue to consider and audit the Laseter claim, upon its presentation to the Board by said Lucenda Laseter, and said Board, upon presentation is also authorized to direct payment of said $389.50 by the Treasurer of this Court out of any funds in the Fine and Forfeiture Fund of the County, available for officers' fees, or any funds that may be available in the future until the amount is fully paid to the widow of the deceased sheriff.

"The Board of Revenue desires to pay this money as provided in the Act of the Legislature (a copy of said Act hereto attached for your information), but prefers for the Attorney General's office to approve of the payment as legal. The Board is aware that publication of this local bill was made, but is not advised that it was done according to law, and aware of the fact that your office can without trouble ascertain if the publication of the Act was legally made.

"The Board therefore requests your opinion as to its authority to pay the said amount as provided by the terms of the said Act of the Legislature."

Answering your inquiry, I call your attention to Section 106 of the Constitution of Alabama, 1901, which is as follows:

"Section 106. No special, private, or local law shall be passed on any subject not enumerated in Section 104 of this constitution, except in reference to fixing the time of holding courts, unless notice of the intention to apply therefor shall have been published, without cost to the state, in the county or counties where the matter or thing to be affected may be situated, which notice shall state the substance of the proposed law and be published at least once a week for four consecutive weeks in some newspaper in such county or counties, or if there is no newspaper published therein, then by posting the said notice for four consecutive weeks at five different places in the county or counties prior to the introduction of the bill; and proof by affidavit that said notice has been given shall be exhibited to each house of the legislature, and said proof spread upon the journal. The courts shall pronounce void every special, private, or local law which the journals do not affirmatively show was passed in accordance with the provisions of this section."

The notice and proof of a bill authorizing the Board of Revenue of Barbour County to pay Lucinda Laseter, as widow of J. B. Laseter, former Sheriff of Barbour County, the sum of $389.50 as a claim against the Fine and Forfeiture Fund was published in The Clayton Record, a newspaper in

Barbour County, for four consecutive times, the same appearing in the issues dated June 30, July 7, July 14, and July 21, 1939.

Senate Bill No. 357 with proper notice and proof of publication was introduced on August 8, 1939, in the Legislature. It was passed and approved by the Governor on September 6, 1939.

A copy of the notice and proof is pasted upon a page of the Journal of the Senate on the thirty-fourth Legislative day, and on a page of the Journal of the House of Representatives on the thirty-eighth Legislative day.

It is my opinion that Senate Bill No. 357, approved September 6, 1939, complies with all of the requirements of Section 106 of the Constitution.

Ex Parte Lower, 178 Ala. 87, 59 So. 611,

Ex Parte Kelly, 153 Ala. 668, 45 So. 290,

Dudley v. Fitzpatrick, 143 Ala. 162, 39 So. 384.

The grant of legislative power by the Constitution of the State is a general grant of all the legislative powers residing in the people, as a sovereign community, subject only to such limitations and qualifications as are expressed in the Constitution of the State. **Ex Parte Lambert,** 52 Ala. 79.

After a careful consideration of Senate Bill 357, supra, I am of the opinion that it is constitutional as far as Section 106 of the Constitution is concerned. I might add that I know of no other section of the Constitution which it violates. **Moses v. Tigner,** 232 Ala. 457, 168 So. 194; **Board of Revenue and Road Commissioners of Mobile County,** 227 Ala. 374, 149 So. 850.

I also call to your attention Section 2619, Code of Alabama, 1923, which is as follows:

> "Section 2619. Officer paying and person receiving money paid under void law, not liable therefor.—When any state or county official shall have collected or paid out any money, as fees, salary or compensation for official services rendered under any law of Alabama, general or special, which law, subsequent to such collection or paying out, shall be declared by the supreme court of Alabama to be unconstitutional or void or illegal, such officer shall not be liable, either individually or on his official bond, in any suit brought for the recovery of such money, so collected or paid out, nor shall the person to whom the same shall have been paid, be liable therefor."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 26, 1939.

Hon. A. H. Collins,
State Superintendent of Education,
State Capitol.

Schools and School districts—

A person may not at one and the same time hold the positions of County Superintendent of Education and City Superintendent of Schools of a city within the county.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated October 10, 1939, which reads as follows:

"Your opinion is requested on the following questions:

"1. In a county in which a city school system or systems have not been consolidated with the county school system, can the city superintendent of an independent city system serve at the same time as the county superintendent of education?

"2. Assuming the same situation as described in question 1, can the county superintendent of education at the same time serve as superintendent of education of an independent city school system in said county?

"Your attention is respectfully called to sections 86, 93, 138, 139, 149, 150, 195, 219, 220, and 221 of the Alabama School Code of 1927."

The determination of the questions presented in your letter cannot be made without reference to the statutes and the Constitution of this State.

I would also like to call your attention to the fact that the conclusion reached in this opinion is predicated upon the assumption that the general laws of the State of Alabama relating to County Superintendents of Education and City Superintendents of Schools are in force and effect in the county to which you have reference. No consideration is given to local statutes in view of the fact that you do not set out the county involved.

Sections 86, 93, 138, 139, and 149 of the Alabama School Code of 1927 read respectively as follows:

"86. County Board of Education.—The general administration and supervision of the public schools of the educational interests of each county, with the exception of cities having a city board of education, shall be vested in the county board of education. Provided, however, such general administration and supervision of any city having a city board of education may be consolidated with the administration and control

of educational matters affecting the County and vested in the County Board of Education."

"93. County Superintendent of Education.—The County Board of Education shall appoint as its executive officer a County Superintendent of Education who shall also be the secretary of the County Board of Education. As Secretary he shall conduct all correspondence of the Board, keep and preserve all of its records, receive all reports required by the Board, and see that such reports are in proper form, complete and accurate. He shall have the right to advise on any question under consideration by the Board, but shall have no vote. In case the office of the County Superintendent of Education is temporarily vacant, or when the County Superintendent of Education is absent by reason of the nature of business in hand, or otherwise, the Board shall appoint one of its members to act for the time being as Secretary. The bond of the County Superintendent of Education shall be responsible for the faithful performance of duties by the member of the County Board of Education appointed to act as secretary in the absence of the County Superintendent."

"138. County Superintendent of Education.—There shall be a County Superintendent of Education in each County of this State who shall act as the chief executive officer of the County Board of Education, and who shall also be secretary of the County Board of Education. The County Board of Education of each County shall appoint a Superintendent of Schools for a term of from two to four years from the first day of July next succeeding his appointment."

"139. Qualifications of County Superintendent.—No person shall be eligible for appointment by any County Board of Education or for political party nomination or for election to the office of County Superintendent of Education of any County, who does not as now required hold an Alabama certificate in administration and supervision based as a minimum upon graduation from a standard normal school or equivalent education, with at least one year of additional study of college grade and proof of three years of successful teaching experience next preceding his appointment; provided that the provisions of this section shall not apply to County Superintendents of Education in office on October 1, 1923. A County Superintendent of Education need not be a qualified elector of the County in which he serves."

"149. County Superintendent must devote entire time to office.—The County Superintendent of Education shall devote his entire time to public school business, and shall receive such compensation as the County Board of Eductaion shall direct. In counties where superintendents of education are elected by direct vote of the qualified electors, the salary for the office must be fixed prior to the beginning of the term of office."

The foregoing statutory provisions relate to the method of selection of County Superintendents of Education under the general laws of this State as well as to their duties, term of office, etc.

The following quoted provisions of the Alabama School Code of 1927 deal with the City Superintendent of Schools under the general laws, Sections 195, 219, 220, and 221, thereof reading respectively as follows:

"195. City Superintendent; Appointed by City Board of Education.—The City Board of Education shall appoint as its executive officer a Superintendent of Schools, who may also be secretary of the Board of Education. A City Superintendent of Schools must possess the same qualifications required of a County Superintendent of Education. The Superintendent of Schools shall conduct all correspondence of the Board, keep and preserve all of its records, receive all reports required by the Board, and see that such reports are in proper form, complete and accurate. He shall attend all meetings of the Board and of its committee. He shall have the right to advise on any motion under consideration, but shall have no vote. In case the secretary is absent, the Board shall appoint some member of the Board or a teacher in the schools under the jurisdiction of said Board to act for the time being."

"219. Appointment of City Superintendent of Education.—The City Board of Education may appoint a City Superintendent of Schools to hold office at the pleasure of the Board. The City Superintendent of Schools shall receive such compensation as the City Board of Education shall direct. The City Board of Education may remove the City Superintendent of Schools for incompetency, immorality, misconduct in office, wilful neglect of duty, or when, in the opinion of the Board, the best interests of the schools require it."

"220. Qualifications of City Superintendent.—No person shall be eligible for appointment as City Superintendent of Schools who does not hold an Alabama certificate in administration and supervision based as a minimum upon graduation from a standard normal school or equivalent education with at least one year of additional study of college grade and proof of three years of successful teaching experience."

"221. Duties of City Superintendent.—The City Superintendent of Schools shall be the chief executive officer of the City Board of Education, and shall see that the laws relating to the schools, and the rules and regulations of the City Board of Education are carried into effect. The City Superintendent of Schools shall explain the true intent and meaning of the school laws, and of the rules and regulations of the City Board of Education, and of the State Board of Education, subject to the provisions of this Code. He shall decide, without expense to the parties concerned, all controversies and disputes involving the rules and regulations of the City Board of Education, and the proper administration of the public schools. He shall have authority to administer oaths and to examine under oath witnesses in any matter pertaining to the public schools of the City, and to cause the examinations to be reduced to writing."

The first question which presents itself is as to whether or not there is any constitutional inhibition against the same person being County Superintendent of Education and Superintendent of Schools of a city within the county of which he is County Superintendent.

The only section of the constitution in my opinion which might have any bearing on this question is Section 280 which is as follows:

"Section 280. No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars; shall, during his continuance in such office, hold any

office of profit under this state; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this state, except justices of the peace, constables, notaries public, and commissioner of deeds."

I am of the opinion that this section of the Constitution does not prevent a person from holding both positions, in view of the fact that both of the positions are not offices of profit within the meaning of Section 280, supra.

The Supreme Court in the case of **McMurray v. County Board of Education of Franklin County,** 216 Ala. 144, 112 So. 644, and **Springer v. State,** 229 Ala. 339, 157 So. 219, has definitely determined the fact that a County Superintendent of Education has a fixed term of office of profit. While the section of the Constitution before the court in the case first cited was Section 281 of the Constitution, and the section before the court in the other case was Section 175 of the Constitution, it is my opinion that such a holding is equally applicable to the term "office of profit" used in Section 280, supra, and that a County Superintendent of Education holds an office of profit within the meaning of said section.

The Supreme Court, however, in the case of **Dunlap v. Board of Education of Winston County et al.,** 218 Ala. 631, 120 So. 144, spoke as follows on the difference between the terms and incumbency of a County Superintendent of Education and a City Superintendent of Schools:

"Be it understood that the terms and incumbency of the City Superintendent of Schools and that of County Superintendent of Schools are different. McMurray v. County Board of Education, 216 Ala. 144, 112 So. 644; Petree v. McMurray, 210 Ala. 639, 98 So. 782 * * * his (the City Superintendent of Schools) term and incumbency are not * * * protected against removal. It was provided by Section 182, School Code of 1924, that the City Board of Education had the right of removal of a Superintendent for stated causes, or 'when, in the opinion of the board, the best interests of the schools require it.' General Acts 1919, pp. 567, 600, Article 9, Sec. 1."

Section 219, supra, is identical in legal effect, if not in language, to Section 182 of the School Code of 1924. Therefore, since a City Superintendent of Schools does not have a fixed term of office, it is my opinion that he merely holds a position of employment, and that he does not hold an office of profit within the meaning of Section 280, supra. Cf. **State ex rel. Glenn v. Wilkinson,** 220 Ala. 172, 124 So. 211.

In view of the fact that the position of City Superintendent of Schools is not an office of profit within the meaning of said section, it would not stand in the way of a person holding both the position of County Superintendent of Education and City Superintendent of Schools of a city within that county at one and the same time.

It is then necessary to see if there are any provisions of our statutory law which prevent the holding of these two positions by the same person at one and the same time.

I am of the opinion that Section 149, supra, discloses a legislative intent to require the County Superintendent of Education to devote his entire time

to duties in connection with the public schools over which the County Board of Education has supervision and control, and the County Board of Education does not have supervision and control over the schools within a city system when that system has not been consolidated with the county system in the manner provided for such consolidation in the Alabama School Code of 1927. While it is true that all public schools, both county and city, are a part of the state-wide public school system (**State v. Tuscaloosa County,** 233 Ala. 611, 172 So. 892; **Williams, Supt. of Banks, et al. v. State for use and benefit of Pickens County et al.,** 230 Ala. 395, 161 So. 507,) and it might, therefore, be argued that the words "public school business" used in Section 149, supra, include the business of public schools within a city system, I do not believe that such was the intention of the Legislature. Could a County Superintendent of Education act as principal or teacher of a public school in a city system within his county? I think not. Could a County Superintendent of Education act as principal or teacher of a public school in another county or in a city in another county? I think not. Yet, in so acting he would be devoting his time to "public school business," under that argument. Since the words "public school business" used in Section 149, supra, in my opinion, mean "public school business" over which the County Board of Education has supervision and control, and that section requires the County Superintendent of Education to devote his entire time to such business, I am of the opinion that this is a statutory inhibition against a person who is County Superintendent of Education holding the position of City Superintendent of Schools of a city within the county at one and the same time.

The Legislature has provided a method by which the administration of both county and city schools may be consolidated. Section 108 et seq. of the Alabama School Code of 1927. However, when such consolidation is had, the City Board of Education ceases to exist, and the supervision and control of all the schools within the county is vested in the County Board of Education. The fact that the Legislature has thus provided a method for the consolidation of the administration of county and city schools under one governing body, i.e., the County Board of Education, to my mind, evinces a clear legislative intent that the two systems remain entirely separate and distinct, unless consolidated in the manner which the Legislature has provided therefor. The statutory provisions, quoted, supra, show that the County Superintendent of Education is the executive officer of the County Board of Education which Board, in the absence of consolidation, is not vested with the supervision and control of the public schools within a city, and that the City Superintendent of Schools is the executive officer of the City Board of Education which Board is not vested with the supervision and control of the public schools within the county outside the city. If one person were allowed to hold both the position of County Superintendent of Education and the position of City Superintendent of schools of a city within the county at one and the same time, he would be in the impossible position of serving two masters. Such a situation does not exist when there has been a consolidation of the administration of county and city schools for the reason that, as pointed out above, in such a case the Count Board of Education has supervision and control of all the schools within the county, and the City Board of Education ceases to exist.

The premises considered, it is my opinion that a City Superintendent of Schools cannot at one and the same time serve as County Superintendent of Education.

I am also of the opinion that a County Superintendent of Education cannot at one and the same time serve as Superintendent of City Schools of a city within the county.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 26, 1939.

Hon. Fred Grantham, Clerk,
Jury Commission, Geneva County,
Geneva, Alabama.

Jury Commissioner—

1. Under Acts 1931, as amended, Jury Commission may meet and refill jury box without order from Circuit Judge.

2. Clerks of Jury Boards entitled to compensation when acting under direction of Jury Board.

3. Members of Jury Commission appointed under Act No. 59, General Acts, 1939, approved March 2, 1939, are required to meet without order or authority from Circuit Judge.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of October 7, 1939, in which you request my opinion as follows:

"I respectfully request rulings on questions concerning (a) procedure of Jury Board for year 1938, and (b) procedure of Jury Commission for year 1940, as follows:

"(a) During the year 1938, as Clerk of the Jury Board of Geneva County and pursuant to proper instructions from Jury Board of Geneva County, I performed 15 days work as such Clerk preparing lists of names etc. preparatory to filling Jury Box of Geneva County, and thereafter properly filed claim for $75.00 for such services, @ $5.00 per day, as prescribed by Act. No. 47, Section 8, Page 57, Acts of 1931. Questions were raised as to whether the Jury Board could properly and legally proceed with preparations for filling Jury Box without an order and/or authority from the Circuit Judge, or judge of court of like jurisdiction, to so proceed, under the provisions of Act No. 288, Section 1, Page 713, Acts of 1935, and as to whether I, as Clerk of the Jury Board, could

properly and legally collect for services above referred to if Jury Board did not have an order and/or authority above referred to.

"I here refer generally to all of Act No. 47, Page 55, Acts of 1931, and specially to Sections 10, 11, and 12 of said Act.

"Please render a ruling on the following questions that proper action may be had on the claim filed by me and above referred to:

"Could the Jury Board of Geneva County for year 1938 properly and legally proceed with preparations for filling Jury Box of Geneva County for year 1938 without an order and/or authority from the Circuit Judge, or judge of court of like jurisdiction, to so proceed?

"Can the Clerk of the Jury Board of Geneva County for the year 1938 be properly and legally paid for services rendered as such Clerk during the year 1938, preparatory to filling Jury Box of Geneva County for year 1938, and claim properly filed therefor, if such jury Board did not have an order and/or authority from the Circuit Judge, or judge of court of like jurisdiction, to proceed with preparations for filling Jury Box for year 1938?

"(b) The question has been raised as to whether the Jury Commission of Geneva County can properly and legally proceed with preparations for filling Jury Box of Geneva County for year 1940 without an order and/or authority from the Circuit Judge, or judge of court of like jurisdiction, to so proceed, under the provisions of Act No. 55, Acts of 1939.

"Please render ruling on the following question that Jury Commission of Geneva County may properly and legally proceed under the provisions of Act No. 55, Acts of 1939:

"Can the Jury Commission of Geneva County for the year 1940 properly and legally proceed with preparations for filling Jury Box of Geneva County for year 1940 and properly and legally fill Jury Box of Geneva County for year 1940, under the provisions of Act No. 55, Acts of 1939, without an order and/or authority from the Circuit Judge, or judge of court of like jurisdiction, to so proceed?"

Answering your first inquiry I call your attention to the General Acts of Alabama, Regular Session 1931, pages 58, 59, which reads as follows:

"Section 13. The Jury Board shall meet in the court house at the county seat of the several counties as soon after the approval of this Act as is practicable and thereafter on the first Monday in October in each year, and shall make in a well bound book a roll containing the name of every male citizen living in the county who possesses the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the Jury Board shall cause to be written on the roll opposite every name placed thereon the occupation, residence and place of business of every person selected, and if the residence has a street number it must be given. Upon the completion of the roll the Jury Board shall cause to be prepared plain white cards all of the same size and texture and shall

have written or printed on the cards the name, occupation, place of residence and place of business of the person whose name has been placed on the jury roll; writing or printing but one person's name, occupation, place of residence and of business on one card. These cards shall be placed in a substantial metal box provided with a lock and two keys which box shall be kept in a safe or vault in the office of the probate judge and if their be none in that office, the Jury Board shall deposit it in any safe or vault in the court house to be designated on the minutes of the Board, and one of said keys thereof shall be kept by the President of the Jury Board. The other of said keys shall be kept by a judge of a court of record having juries other than the probate or circuit court and in counties having no such court then by the judge of the circuit court for the sole use of the judges of the courts of said county needing juries. The jury roll shall be kept securely and for the use of the Jury Board exclusively. It shall not be inspected by any one except the members of the Board or by the Clerk of the Board upon the authority of the Board, unless under an order of the judge of the circuit or other court of record having jurisdiction."

"Section 14. The Jury Board shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or over sixty-five years of age or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a free holder or householder his name may be placed on the jury roll and in the jury box."

"Section 16. Whenever the names in the jury box are exhausted or so far depleted that they will probably be exhausted at the next drawing of jurors, the Jury Board must proceed to make and certify a new roll and deposit the names in the box in all respects as provided in this Act, and for this purpose the Jury Board must meet whenever it is necessary and refill the jury box."

"Section 18. Whenever it shall appear to the judge of the circuit court or court of like jurisdiction that the jury box is so nearly exhausted as to require refilling, he shall notify the President of the Jury Board, whereupon the Jury Board shall proceed to refill the box as herein provided."

The Legislature in 1935 amended Section 18 of the law pertaining to jury boards so as to read as follows:

"Section 18. Whenever it shall appear to the Judge of the Circuit Court, or court of like jurisdiction, that the jury box is so nearly exhausted as to require refilling, he shall notify the President of the Jury Board, who in term shall call together the other members of the Board and shall proceed to refill the box as herein provided; provided, however, the Judge of the Circuit Court, or court of like jurisdiction, may, whenever in his discretion he deems it necessary or expedient, call the Jury Board together and empty and refill the jury box of the particular county, as herein provided."

This office has ruled "that the matter of refilling the jury box is a matter which addresses itself first of all to the jury board who are required, as above pointed out, to refill the jury box each year at the meeting of the jury board beginning on the first Monday in October. Secondly, the jury box may be refilled at any time that in the discretion of the Judge of the Circuit Court or court of like jurisdiction, it may be deemed necessary and expedient.

Biennial Report of Attorney General, 1936-38, page 352.

The amendment to Section 18 by the Legislature of 1935 did not take away the authority vested in the jury commission to refill jury box under Section 16 of the acts of 1931, but was designed to give Circuit Judges more clearly defined power and discretion in having jury boxes refilled when found necessary or expedient in the administration of justice.

It follows that the Jury Commission had a right to meet and refill the jury box without an order from the Circuit Judge.

In answer to your second inquiry, I call your attention to Act No. 47, approved February 20, 1931, General Acts of Alabama, Regular Session, 1931, page 58, which reads as follows:

"Section 8. * * * shall be paid for his services rendered under the direction of the Jury Board the sum of Five Dollars ($5.00) per day while actually engaged in performing his duties to be paid out of the county treasury upon the order of the President of the Jury Board. * * *

"Section 9. Every clerk of a Jury Board before entering upon the discharge of his duties under this Act, must take and subscribe the oath of office prescribed by Section 279 of the Constitution and file the same for record in the probate office of the county.

"Section 10. Any member of a Jury Board or clerk thereof who neglects to perform any duty imposed upon him by this Act, or any person who being duly summoned to attend before the Jury Board wilfully fails to do so, or attending refuses to testify, is guilty of a misdemeanor.

"Section 11. The clerk of the Jury Board shall, under the direction of the Jury Board, obtain the name of every male citizen of the county over twenty-one and under sixty-five years of age and their occupation, place of residence and place of business, and shall perform all such other duties required of him by law under the direction of the Jury Board.

"Section 12. The clerk of the Jury Board must give such time to the performance of his duties as may be required by the Jury Board, but shall not be paid for Sundays. The Jury Board may at any time discharge any clerk employed by it and employ another."

This office has ruled that the "compensation of the clerk of a jury board is governed by Section 8 and he is to receive five dollars per day for services rendered under direction of the Jury Board while actually performing his duties, out of the county treasury, upon the order of the President of the Jury Board." Opinion to Hon. James M. Scott, Chairman of the Jury

Board, DeKalb County, May 21, 1931, Biennial Report of Attorney General, 1932-34, page 31.

The phrase "under the direction of the Jury Board" is an expression in general terms giving the Jury Board the right to supervise and control the work and includes the right to limit the clerk as to the time spent in performing his duties. Biennial Report of Attorney General, 1934-36, page 385.

I am of the opinion that the clerk of the Jury Board is entitled to compensation while working under the direction of the Jury Board.

Answering your third inquiry, I call your attention to Act No. 59, General Acts, 1939, approved on March 2, 1939, which created new Jury Commissions in all counties except Jefferson and Montgomery. The Act became effective on the day it was approved and by its provisions abolished the old Jury Commission then in existence. Sections 8, 13, 15, 16 and 18 of said Act read as follows:

"Section 8. In Counties having seventy-five thousand population or less by the last Federal census preceding the employment, the clerk of the Circuit Court may be employed as the Clerk of the Jury Commission and in such counties the Clerk of the Jury Commission whether he be the clerk of the Court or not, shall be paid for his services rendered under the direction of the Jury Commission the sum of Five Dollars ($5.00) per day while actually engaged in performing his duties, to be paid out of the county treasury upon the order of the President of the Jury Commission. In counties having more than seventy-five thousand and less than two hundred thousand population according to the last or any subsequent Federal Census, the Commission shall employ a clerk who shall hold no other office during the term of his employment and who shall be paid for his services rendered under the direction of the Jury Commission, the sum of Five Dollars ($5.00) per day while actually engaged in performing his duties, to be paid out of the county treasury upon the order of the President of the Jury Commission. In counties having more than two hundred thousand population according to the last or any subsequent Federal census, the Jury Commission in any such county shall have authority to employ such clerical assistance as such Commission deems necessary and proper, and may expend for such clerical assistance in compensation and in paying their reasonable and necessary expense in performing the duties of their employment a sum not to exceed Four Hundred and Fifty Dollars ($450.00) per month to be paid out of the county treasury upon the order of the President of the Jury Commission. In counties having a population of 75,000 or less, according to the last preceding Federal census, the clerk of the Jury Commission shall not receive more than $300.00 as compensation for his service in any one year."

"Section 13. The Jury Commission shall meet in the Court house at the county seat of the several counties as soon after the approval of this Act as is practicable and thereafter on the first Monday in October in each year, and shall make in a well bound book a roll containing the name of every male citizen living in the county who possessed the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the Jury Commission shall cause to be written on the roll opposite every name place thereon the occupation, residence and place of business of every person selected, and if the residence has

a street number it must be given. Upon the completion of the roll the Jury Commission shall cause to be prepared plain white cards all of the same size and texture and shall have written or printed on the cards the name, occupation, place of residence and place of business of the person whose name has been placed on the jury roll; writing or printing but one person's name, occupation, place of residence and of business on one card. These cards shall be placed in a substantial metal box provided with a lock and two keys which box shall be kept in a safe or vault in the office of the probate judge and if there be none in that office, the Jury Commission shall deposit it in any safe or vault in the court house to be designated on the Minutes of the Commission, and one of said keys thereof shall be kept by the President of the Jury Commission. The other of said keys shall be kept by a judge of a court of record having juries other than the probate or circuit court and in counties having no such court then by the judge of the circuit court for the sole use of the judges of the courts of said county needing jurors. The jury roll shall be kept securely and for the use of the Jury Commission exclusively. It shall not be inspected by any one except the members of the Commission or by the Clerk of the Commission upon the authority of the Commission, unless under an order of the judge of the circuit or other court of record having jurisdiction."

"Section 15. The Jury Commission in each of the counties of this State shall meet as soon after the approval of this Act as is practicable and empty the jury boxes in their respective counties and from the new jury roll prepared as herein prescribed refill such jury boxes. Provided, however, that the provisions of this Section (15) shall not apply to those counties in the State having a population of Three Hundred Thousand (300,000) or more according to the latest Federal Census, and in which the Jury box or boxes have been legally filled within twelve (12) months preceding the approval of this Bill."

"Section 16. Whenever the names in the jury box are exhausted or so far depleted that they will probably be exhausted at the next drawing of jurors, the Jury Commission must proceed to make and certify a new roll and deposit the names in the box in all respects as provided in this Act, and for this purpose the Jury Commission must meet whenever it is necessary and refill the jury box."

"Section 18. Whenever it shall appear to the Judge of the Circuit Court, or court of like jurisdiction, that the jury box is so nearly exhausted as to require refilling, he shall notify the President of the Jury Commission, who in turn shall call together the other members of the Commission and shall proceed to refill the box as herein provided; provided, however the Judge of the Circuit Court or court of like jurisdiction, may, whenever in his discretion he deems it necessary or expedient, call the Jury Commission together and empty and refill the jury box of the particular county, as herein provided."

It will be observed that by the provisions of Section 13 the Commission is directed to meet as soon as practicable after the approval of the Act and empty the jury boxes and refill the same from the new jury roll prepared by them. They do not need an order and/or authority from the Circuit Judge to proceed. The duty imposed upon the commission is mandatory.

You will note that under Section 8 of said Act the Clerk of a Jury Commission in counties of population of 75,000 or less shall not receive more than

$300.00 as compensation in one year. Under Section 5 of said Act each member of the Jury Commission shall be paid Five Dollars per day for the time actually engaged in the discharge of his duties as such member. The compensation of each member of the Commission shall not exceed for any year of his term the following amount, viz: in counties exceeding twenty-five thousand and not exceeding fifty thousand population Two Hundred Dollars.

This office has ruled that the term year for new members of the Jury Commission runs from the first Monday after the second Tuesday in January until the same time the following year, and that the first term of the members of the newly created jury commission would begin from the date of their appointment and end the first Monday after the second Tuesday in the following January. This office has also ruled that compensation paid to members of the old jury board should not be considered in determining the amount due members of the newly created jury commission.

Quarterly Report of Attorney General, Vol. XV. page 251;

Quarterly Report of Attorney General, Vol. XV, page 270.

The premises considered, it is my opinion that the matter of refilling the jury box addresses itself first of all to the Jury Commission under Section 15 and 16 of the said Act, supra, and secondly, under Section 18 of said Act, supra, the Judge of the Circuit Court of like jurisdiction when in his discretion he deems it necessary and expedient.

Under Section 16 the Jury Commission has authority to meet whenever necessary to refill the jury box.

Under Section 18 the Judge of the Circuit Court or court of like jurisdiction has authority to call the jury commission together to refill the jury box.

The Act is plain and explicit as to the duties of the Jury Commission Clerks of the Jury Commission and the Judge of the Circuit Court.

Trusting that this answers your inquiry, I am

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 27, 1939.

Hon. I. C. Heck,
State Comptroller,
Capitol.

Tax Assessors and Tax Collectors—Commissions—Construction and applicability of Act No. 326 (General Acts, 1939) approved August 31, 1939, and Act No. 325 (General Acts, 1939) approved August 31, 1939, discussed generally.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

On September 25, 1939, you addressed two requests for official opinion to me, which will be here considered and answered together, the subject matter of the two, i. e., the commissions of Tax Assessors and Tax Collectors, being closely interrelated. Your letters read, respectively, as follows:

"On August 31, 1939, House Hill No. 322, Governor's No. 326, was approved, fixing the rate of commissions to be paid the Tax Assessors of the State after October 1, 1939.

"Since some Tax Assessors are going out of office on September 30, 1939, and new ones going in, the following questions have arisen:

"1. What rate of commissions is to be used in paying the Assessors for assessing property from October 1, 1938 to September 30, 1939, on which the taxes became due and payable on October 1, 1939?

"2. What rate of commission is to be paid the Tax Assessor for assessing automobile and escapes, from October 1, 1939 to September 30, 1940, keeping in mind that auto assessments are made on the date the taxes become due, October 1, 1939, but the assessments are for the previous year, from October 1, 1938 to September 30, 1939?

"3. In figuring the commissions on auto assessments and escape assessments from October 1, 1939 to September 30, 1940, should the rate of commission be in the higher bracket or the lower bracket? For instance, the total amount the Assessor is entitled to receive commission on is $16,000. This includes assessments from October 1, 1938 to September 30, 1939, on all real estate and personal property and auto assessments and escapes from October 1, 1939 to September 30, 1940. The auto assessments amount to $1,000, keeping in mind the fact that the Assessor going out of office on September 30, 1939, has made all the assessments that are due October 1, 1939, except auto and escape assessments, and the law states the Assessor is to be paid out of the first monies collected.

"Should the Assessor going out of office on September 30, 1939, be paid commission out of the first money collected on the assessments made prior to October 1, 1939, on the higher brackets, namely, 8% on the first thousand, 4% on the second, 2% on the next ten, 1½% on the next forty-eight thousand, etc., and the new Assessor be paid on auto assessments and escapes in the lower bracket of 1% in the new rate of commissions?

"It has been the policy to figure the commissions on auto assessments in the lower bracket, because the new Assessor would break even on October 1, 1940.

"4. Should the commissions on Homestead exemptions be figured on the lower bracket or the rate of commission preceding the rate for auto assessments? Since the adoption of the Homestead exemptions, it has been the policy to figure the Homestead commissions on the lower bracket.

This policy automatically threw the commission on auto assessments in a bracket or rate higher than the rate for Homestead exemptions.

"5. Is the Tax Assessor who goes out of office on September 30, 1939, entitled to commissions on Homesteads?

"6. Are all the Tax Assessors who are on a commission basis entitled to commission on Homesteads assessed from October 1, 1938 to September 30, 1939?

"7. If the Assessors are entitled to commission on Homesteads, what rate of commission is to be used?

"Please advise me on the above questions as soon as possible."

* * * * *

"On August 31, 1939, House Bill No. 321, Governor's No. 325, was approved changing the rate of commission for the Tax Collectors of the State after October 1, 1939. Please advise me on the following questions:

"1. Is the Tax Collector entitled to commission on Homestead exemptions assessed from October 1, 1938 to October 1, 1939?

"2. What rate of commission is to be used in figuring the Collectors' Commission on auto and escape assessments from October 1, 1939 to September 30, 1940—the higher rate 10%, or the lower rate 1%—when the collections are $16,000.00?

"3. In figuring the commission on Homestead exemptions for the Collectors, should the bracket preceding the bracket for auto assessments or collections be used, or the lower bracket?

"For instance, if the amount the Collector is entitled to commissions on is $16,000 and the auto tax is $1,000 and the Homestead exemptions $1,000, would the Homestead commission be 1% or 1½%?

"4. Should not the amount of commission on Homesteads for the 2½ mill, 1 mill and 3 mill fund be deducted from the Collectors' commission for each of the funds, and certified into the Treasury to the credit of the General Fund of the State?"

Before considering your several inquiries specifically, I deem it advisable to set out the pertinent provisions of our statutory law, and to make certain general statements and observations.

Section 22 of the 1935 Revenue Act fixed the commissions of Tax Assessors, and Section 161 of said Act fixed the commissions of Tax Collectors. These sections read, respectively, as follows:

"Section 22. TAX ASSESSORS COMMISSIONS. The tax assessor shall, during the current term of the present incumbent of said office be paid commissions as now provided by law, after the expiration of the

present term of the present incumbent of the office of tax assessor, the tax assessor shall be entitled to receive from the tax collector, out of the first money collected by him, giving him duplicate receipts therefor, one of which receipts shall be forwarded to the State Comptroller by the tax collector, the following commissions, to-wit: In counties where the collections, not including taxes on real estate bid in at tax sales by the State, do not exceed twelve thousand dollars, the rate of commission shall be eight percent on the first thousand dollars, four percent on the second thousand dollars, and two per cent on the remainder. In counties where collections, not including taxes on property bid in at tax sales by the State, exceed twelve thousand dollars, the commission shall be as above declared up to twelve thousand dollars, and one and one-half percent of the remainder up to sixty thousand dollars, and on all above sixty thousand dollars, one percent. He shall also be entitled to receive two per cent on all collections made by the tax collector of special taxes, whether such special taxes be levied for the State or County, to be paid out of such special taxes. The tax assessor shall receive two percent commissions on all special county or district taxes levied for school purposes; but he shall not receive such commissions on such special school taxes unless he has properly apportioned such special taxes. In counties of more than one hundred and fifty thousand population according to the last Federal Census, or any subsequent Federal census, no fees or commissions shall be allowed for assessing the three mill county school tax, and the three mill district school tax, but in lieu thereof the tax assessor in such counties shall be paid by the collector of such county the sum of one thousand dollars, which is provided by law to be retained by the tax collector for the tax assessor."

"Section 161. TAX COLLECTORS COMMISSIONS. The Tax Collector shall, during the current term of the present incumbent of said office be paid commissions as now provided by law, after the expiration of the present term of the present incumbent of the office of Tax Collector; the Tax Collector shall be entitled to receive commissions on taxes collected by him, not including taxes on real estate bid in by the State at tax sale as follows: In counties where collections not including taxes on real estate bid in by the State at Tax sale, do not exceed twelve thousand dollars, the rate of commission shall be eight per cent on the first thousand dollars, four per cent on the second thousand dollars, and two per cent on the remainder. In counties where the collections, not including taxes on real estate bid in at tax sales by the State, exceed twelve thousand dollars, the commissions shall be as above declared up to twelve thousand dollars, and one and one-half per cent on the remainder up to sixty thousand dollars, and all above sixty thousand dollars, one per cent. He shall also be entitled to receive two per cent on all collections made by him of special taxes, whether such special taxes be levied for the State or County, to be paid out of such special taxes. The Tax Collector shall receive two per cent commission on all special county or district taxes levied for school purposes. The Collector may retain his commissions upon collection when he makes payment into the State Treasury. In Counties of more than one hundred and fifty thousand population according to the last Federal Census, or any subsequent Federal Census, no fees or commissions shall be allowed for collecting the three mill county school tax and the three mill district school tax, but in lieu thereof the Tax Collector of such counties shall retain the sum of two thousand dollars, per annum, one thousand dollars of which shall be paid by the Collector to the Tax Assessor, for his services rendered in assessing and collecting such taxes, which said amount shall not be paid by said collector into the general funds of the county, and said collector

may retain such amount out of the three mill county school tax when he makes mayment to the treasurer of the county school board. The Collector may retain his commissions upon collections when he makes payment into the State Treasury."

By Act No. 326 (General Acts, 1939), approved August 31, 1939, and Act No. 325 (General Acts, 1939) approved August 31, 1939, these sections were amended to read, respectively, as follows:

"Section 22. TAX ASSESSORS COMMISSIONS.—The tax assessor shall, during the current term of the present incumbent of said office, be paid the commission which is now provided by law; after the expiration of the present term of the present incumbent of the office of tax assessor and beginning on the first day of October, 1939, the tax assessor shall be entitled to receive from the tax collector, out of the first money collected by him, giving duplicate receipts therefor, one of which receipts shall be forwarded to the State Comptroller by the tax collector, the following commissions, to wit:—In counties where the collections, not including taxes on real estate bid in by the State at tax sales, and taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from State taxes, do not exceed twelve thousand dollars, the rate shall be ten per cent on the first five thousand dollars, five per cent on the next four thousand dollars, and four per cent on the remainder. The commission herein provided for is to be calculated on all collections for the general fund of the State and County. In counties where collections, not including taxes on property bid in by the State at tax sales, and taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from State taxes, exceed twelve thousand dollars, the commission shall be as above declared up to twelve thousand dollars, and one and one-half per cent on the remainder up to fifteen thousand dollars, and one percent on the remainder above fifteen thousand dollars. The amount of the commissions on taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from State taxes shall inure to the benefit of the general fund of the State only, and shall be covered into the State Treasury to the credit of said fund. He shall be entitled to receive two per cent on all collections made by the tax collector of special taxes, whether such special taxes be levied for the State or County, to be paid out of such special taxes. The tax assessor shall receive two per cent commissions on all special County or district taxes levied for school purposes; but he shall not receive such commissions on such special school taxes unless he has properly apportioned such special taxes."

"Section 161. TAX COLLECTORS COMMISSIONS.—The Tax Collector shall, during the current term of the present incumbent of said office be paid commissions, as now provided by law; after the expiration of the present term of the present incumbent of the office of tax collector and beginning on the first day of October, 1939, the tax collector shall be entitled to receive commissions on taxes collected by him, not including taxes on real estate bid in by the State at tax sales, and taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from State taxes, as follows: In counties where collections, not including taxes on real estate bid in by the State at tax sales, and taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from State taxes, do not exceed twelve thousand dollars, the rate of com-

mission shall be ten per cent on the first five thousand dollars; five per cent on the next four thousand dollars, and four per cent on the remainder. The Commission herein provided for is to be calculated on all collections for the general fund of the State and County. In counties where the collections, not including taxes on real estate bid in by the State at tax sales, and taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from State taxes, exceed twelve thousand dollars, the commissions shall be as above declared up to twelve thousand dollars, and one and one-half per cent on the remainder up to fifteen thousand dollars, and one per cent on the remainder above fifteen thousand dollars. The amount of the commissions on taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from State taxes shall inure to the benefit of the general fund of the State only, and shall be covered into the State Treasury to the credit of said fund. He shall also be entitled to receive two per cent on all collections made by him of special taxes, whether such special taxes be levied for the State or County, to be paid out of such special taxes. The tax collector shall receive two per cent commissions on all Special County or district taxes levied for school purposes. The collector may retain his commissions upon collections when he makes payment into the State Treasury."

Under both the original and the amended sections the commissions of the Tax Assessors and Tax Collectors were, or are, based on collections, with certain items excluded from the "collections" as that term is used in the sections.

You have advised me that collections on which the commissions were based under the original sections, supra, were divided by you into three general brackets, (1) Amount collected from taxes on real and personal property assessed and collected through the regular channels, in which case the assessments are made in one year and the collections on said assessments are made in the following year; (2) Amount collected from taxes on motor vehicles and from taxes on real and personal property that had escaped taxation (Assessments and collections of taxes on motor vehicles and real and personal property that had escaped taxation are made simultaneously, i. e., the assessments and collections are made in the same year); and (3) Amount which would have been collected from taxes due on real property except for the provisions of the presently applicable law exempting homesteads from State taxes.

You further advised me that under the original sections, supra, you figured the commissions to which the Tax Assessors and Tax Collectors were entitled on collections by putting the amount collected from bracket one first, the amount collected from bracket two second, and the amount which would have been collected from bracket three last, and then applying the graduated percentage schedule provided in these sections.

With the above in mind, I shall attempt to answer your questions seriatim, answering the questions in regard to the commissions of Tax Assessors first.

TAX ASSESSORS—

1. The rate to be used in figuring the commissions to be paid Tax Assessors for assessing property from October 1, 1938, to September 30, 1939,

on which the taxes became due and payable on October 1, 1939, is the rate contained in the original Section 22, supra. The commissions allowed to the Tax Assessor are his compensation for the performance of the services and duties required of him in connection with the assessment of property for taxation, and his commissions accrue at the time he performs the services and duties, and not at the time they are paid to him, and it necessarily follows that the rate to be used in figuring his commissions is the rate which was in effect at the time he performed the services and duties. A reading of original Section 22, supra, will show that the rate therein contained was in effect at the time the Tax Assessor performed his services and duties in assessing property for taxation from October 1, 1938, to September 30, 1939, and a reading of amended Section 22, supra, will show that the rate contained therein did not become applicable until October 1, 1939, and after he had performed these services and duties. Cf. Opinions to Hon. S. D. McGee, Tax Collector, Tuscaloosa County, Tuscaloosa, Alabama, under date of March 6, 1934, (Biennial Report of Attorney General, 1932-34, p. 522); to Hon. W. W. Ramsey, Associate Member, State Tax Commission, Capitol, under date of July 17, 1935 (Biennial Report of Attorney General, 1934-36, p. 236); to Hon. L. A. Garrison, Judge of Probate, Walker County, Jasper, Alabama, under date of October 14, 1935, (Quarterly Report of Attorney General, Vol. I, p. 62; and to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama, under date of January 28, 1939 (Quarterly Report of Attorney General, Vol. XIV, p. 57).

If it were contended that the Legislature intended for the rate contained in amended Section 22, supra, to be used in figuring the commissions to which Tax Assessors were entitled for the performance of their services and duties in assessing property for taxation from October 1, 1938, to September 30, 1939, it suffices to say that, even if it clearly appeared that such was the intention of the Legislature, the rate contained in the amended section still could not apply because of the provisions of Section 281 of the Constitution of Alabama of 1901, which reads as follows:

> "Section 281. The salary, fees, or compensation of any civil officer holding any civil office of profit under this state or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

The term of the Tax Assessors who performed these services and duties from October 1, 1938, to September 30, 1939, began on October 1, 1935, and ended on September 30, 1939 (Section 19(a) of the 1935 Revenue Act), and any change in their compensation, either an increase or a diminution, during that term, without a corresponding change in the duties of their office would have been in violation of the provisions of Section 281, supra.

2. The rate to be used in figuring the commissions to be paid the Tax Assessors for the performance of their services and duties in assessing motor vehicles and real and personal property which had escaped taxation from October 1, 1939, to September 30, 1940, is the rate contained in amended Section 22, supra. This for the reason that the rate contained in amended Section 22, supra, became applicable before the Tax Assessors performed any services or duties in regard to the assessment of motor vehicles and real and personal property that had escaped taxation since October 1, 1939, and their commissions for the performance of these services and duties are to be figured by the rate in effect at the time the services and duties are performed. See authorities cited in answer to question one.

3. In my judgment, the commissions of the Tax Assessors for assessing motor vehicles and real and personal property that had escaped taxation from October 1, 1939, to September 30, 1940, should be figured in this manner: The amount collected from taxes on motor vehicles and taxes on real and personal property that had escaped taxation under assessments made from October 1, 1939, to September 30, 1940, should be placed in the bracket below the amount collected from taxes on real and personal property assessed and collected through the regular channels, and then the graduated percentage schedule contained in amended Section 22, supra, should be applied to determine the amount of commissions due the Tax Assessors for such assessments. The rate contained in amended Section 22, supra, should be applied to this amount for the reason that it became applicable before the assessments were, or will be, made. See authorities cited, supra, in answer to question one.

The reason for the amount collected from taxes on motor vehicles and real and personal property that had escaped taxation being placed in a bracket below the amount collected from taxes on real and personal property assessed and collected through the regular channels is that, as stated hereinabove, you advise me that it has been the policy or practice of your office to so place these amounts in figuring the Tax Assessors' commissions under original Section 22, supra. Neither original Section 22, supra, nor amended Section 22, supra, contain any positive direction to the Comptroller as to the brackets in which he should place the amounts collected from these various sources for the purpose of figuring the Tax Assessors' commissions. In this respect, both original Section 22, supra, and amended Section 22, supra, are identical. Since it was the policy or practice of your office to place the amounts collected from these various sources in brackets as indicated above for the purpose of figuring the Tax Assessors' commissions under original Section 22, supra, and the statute was reenacted, as amended, with no change in this regard, it is my judgment that this policy or practice is now controlling, in the absence of a judicial construction of the statute, under amended Section 22, supra, and that the amounts collected from these sources should be placed in the same brackets for the purpose of applying the graduated percentage schedule contained in amended Section 22, supra, to determine the commissions to which the Tax Assessor is entitled, in which they were placed for this purpose under original Section 22, supra.

Where the construction of a statute by the administrative department charged with the duty of enforcing or applying the statute has been uniform, and the statute is reenacted in precisely the same terms (so far as this question is concerned), the reenactment of the statute without change may be treated as a legislative approval of the departmental construction of the statute, quite as persuasive as the reenactment of a statute which has been judicially construed. See **State v. H. M. Hobbie Grocery Co.,** 235 Ala. 151, 142 So. 46, and authorities therein cited; **Alabama Public Service Commission v. Jones,** 236 Ala. 370, 182 So. 452.

4. For the same reasons given in answer to your question number three, and on the basis of the authorities therein cited, it is my opinion that you should place the amount which would have been collected from taxes due on real property except for the provisions of the presently applicable law exempting homesteads from State taxes in the last bracket, i. e., in a bracket below the amount collected from taxes on real and personal property assessed and collected through the regular channels, the amount collected from taxes on motor vehicles and taxes from real and personal property that had escaped taxation, for the purpose of applying the graduated percentage schedule con-

tained in both original Section 22, supra, and amended Section 22, supra, to determine the Tax Assessors' commissions on such amount.

5 and 6. Your questions numbered five and six present only one legal question and will, therefore, be considered and answered together. My answer to both of these questions is in the affirmative, i. e., the Tax Assessors who performed the services and duties in connection with the assessment of homesteads for taxation from October 1, 1938, to September 30, 1939, are entitled to commissions figured at the rate contained in original Section 22, supra, and in the manner hereinabove outlined, on the amount which would have been collected from taxes due on real property except for the provisions of the presently applicable law exempting homesteads from State taxes, regardless of whether or not the Tax Assessors who performed these services and duties are still in office. This for the reason that their commissions for performing these services and duties accrued at the time the services were performed and prior to the time amended Section 22, supra, became applicable, and, under the law appertaining prior to the applicability of amended Section 22, supra, they were entitled to commissions on this amount. See the authorities cited in answer to question number one.

7. As I understand your question number seven, you desire to know whether or not the rate contained in original Section 22, supra, or amended Section 22, supra, should be used in figuring the commissions to which the Tax Assessors are entitled on the amount which would have been collected from taxes due on real property except for the provisions of the presently applicable law exempting homesteads from State taxes under assessments made from October 1, 1938, to September 30, 1939. In my opinion, the rate contained in original Section 22, supra, should be used in figuring these commissions. See the reasoning used in answer to your first question and the authorities therein cited. As to the bracket in which this amount should be placed for the purpose of figuring these commissions, you are respectfully referred to my answer to your question number four.

TAX COLLECTORS—

1. My answer to your first question is in the negative, i. e., the Tax Collectors are not entitled to commissions on the amount which would be collected from taxes due on real property except for the provisions of the presently applicable law exempting homesteads from State taxes under assessments made from October 1, 1938, to October 1, 1939. This for the reason that the collections under these assessments are not made until after October 1, 1939, and since the provisions of amended Section 161, supra, have become applicable. This amended section very clearly provides that "taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from State taxes" shall not be included in "taxes collected" for the purpose of figuring the commissions to which the Tax Collectors are entitled under the amended section. For reasoning and authorities in support of this conclusion, you are respectfully referred to the reasoning and authorities cited in my answer to your question number one in regard to the commissions of Tax Assessors.

2. In figuring the commissions to which the Tax Collectors are entitled on the amount collected from taxes on motor vehicles and taxes on real and personal property that had escaped taxation from October 1, 1939, to September 30, 1940, you should place this amount in the second bracket, i. e., the bracket below the amount collected from taxes on real and personal

property assessed and collected through the regular channels, and then apply the graduated percentage schedule contained in amended Section 161, supra. See the reasoning and the authorities cited in support thereof in answer to your question number three in regard to the commissions of Tax Assessors.

3. In figuring the Tax Collectors' commissions on the amount which would be collected from taxes due on real property except for the provisions of the presently applicable law exempting homesteads from State taxes, you should place this amount in the third bracket, i. e., the bracket below the bracket in which the amount collected from taxes on real and personal property assessed and collected through the regular channels, and the bracket in which the amount collected from taxes on motor vehicles and taxes on real and personal property that had escaped taxation are placed, and then apply the graduated percentage schedule contained in amended Section 161, supra. This for the same reasons given in my answer to your question number two in regard to the commissions of the Tax Collectors.

Of course, I am sure you are aware of the fact that these commissions no longer go to the Tax Collectors, but inure to the benefit of the General Fund of the State only. See my answer hereinbelow to your question number four in regard to the commissions of Tax Collectors.

4. By "the 2½ mill, 1 mill and 3 mill fund" used in this question, I presume you refer, respectively, to the two and one-half mill tax which is levied for the benefit of the General Fund of the State, the one mill tax which is levied for the benefit of the Confederate Pension Fund of the State, and the three mill tax which is levied for the benefit of the Public School Fund of the State. Commissions on the amount which would be collected from taxes due on real property except for the provisions of the presently applicable law exempting homesteads from State taxes for each of these funds, figured at the rate contained in amended Section 161, supra, and in the manner hereinabove outlined, should be deducted from each of these funds and covered into the State Treasury to the credit of the General Fund of the State. I have already held in my answer to your question number one in regard to the commissions of Tax Collectors that the Tax Collectors are no longer entitled to these commissions, and amended Section 161, supra, provides in pertinent part:

> "The amount of the commissions on taxes which would be due on property except for the provisions of the presently applicable law exempting homesteads from State taxes shall inure to the benefit of the general fund of the State only, and shall be covered into the State Treasury to the credit of said fund."

We trust that this gives you the information on these subjects which you desire.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 27, 1939.

Hon. J. M. Rowe,
State Senator, 25th District,
Elba, Alabama.

Sales Tax—One-half of one per cent of gross proceeds of sale of tractor trailer unit, i.e., assembled truck chassis and trailer, sold as single vehicle, held properly collectible instead of two per cent under Sales Tax Act of 1939 (Pamphlet Acts 1939, pp. 16, 18.)

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of October 12, 1939, in which you request my opinion as follows:

"In those businesses in the State of Alabama engaged in the selling of automotive vehicles, a vehicle commonly called a 'tractor trailer unit' is offered for sale. The tractor trailer unit is a vehicle consisting of an automobile truck chassis to which a trailer is attached. When the vehicle is assembled in such manner as to constitute it a tractor trailer unit, the same is then priced and sold as a single unit.

"However, on the 4th day of March, 1939, the Department of Revenue of the State of Alabama issued a ruling to the effect that a trailer, not being a motor vehicle, does not come within the provisions of sub-section c of section 2 of the Act known as the Sales Tax Act, General Acts of Alabama extra session 1936-37, page 126, levying tax of one-half of one per cent on the gross proceeds of the sale of automotive vehicles; and, said ruling of the Department of Revenue requires automobile dealers, for the purpose of ascertaining the amount of sales tax due in the case of a sale of a tractor trailer unit, although the same for all other purposes is considered and sold as a single unit, to consider the price of the trailer as being separate from the price of the automobile truck chassis to which it is attached, and to compute the amount of tax due on said sale as being two per cent on the price of the trailer, and one-half of one per cent upon the price of the automobile truck chassis. This requirement is made by the Department of Revenue with reference to the sale of a tractor trailer unit, although in an almost identical case, where an automobile truck consists of a truck chassis and a truck body bought separately and assembled by the dealer, no such requirement is made with reference to the separately purchased truck body, but the truck chassis and the body are considered in that case as being one unit, and only one-half of one per cent tax is required on sale of the same.

"If the Department of Revenue is correct in its ruling of March the 4th, then it would appear to me that a situation exists in the sales tax law relative to the sale of tractor trailer unit which it would require legislative action to remedy; and, for that reason, I would like to have your opinion on the matter. Your opinion is therefore requested on the question, as follows:

"If an automobile dealer buys separately an automobile truck chassis and a truck trailer suitable to be attached to the chassis in such manner

as would constitute a single automotive unit, and if he assembles the truck chassis and trailer into a single unit and sells the same as such, would he be liable to sales tax at the rate of one-half of one per cent on the total sales price of such automotive unit, or is the sales tax law such as to require that he consider the trailer as being separate from the truck chassis, although the two are attached so as to constitute one unit, and in that case to compute the amount of sales tax on the trailer at the rate of two per cent on sales price of the same?

"I will thank you very much to give me your opinion on this question."

As I understand the facts detailed in your inquiry, it is contended by the Department of Revenue that two per cent sales tax is collectible on the trailer part of the tractor trailer unit. It appears that the "tractor trailer unit" is a truck chassis to which a trailer is attached at the time of the sale and for the sale of which the dealer has established a predetermined price as a tractor trailer unit.

In my opinion, this ruling of the Department of Revenue is without legal basis. Subsection (c) of Section 2 of the 1939 Sales Tax Act (Pamphlet Acts 1939, pp. 16, 18) provides as follows:

"Upon every person, firm or corporation engaged or continuing within this State in the business of selling any automotive vehicle, an amount equal to one-half of one per cent of the gross proceeds of the sale of said automotive vehicle."

The question is whether or not the tractor trailer unit is an "automotive vehicle" within the foregoing provision. As stated, it is my opinion that it is such an automotive vehicle. When the trailer is attached to the tractor truck, it ceases to be a trailer and the two become one vehicle. **Leaman v. State of Ohio,** 17 Ohio App. 323, 326.

The situation is analogous to the purchase by a consumer of a passenger automobile containing a radio as part of the standard equipment. There can be no doubt that if the radio were purchased as a separate accessory the customer would be required to pay the two per cent tax. However, it is the commonly understood and generally accepted practice that where the radio is a part of the standard equipment it becomes a part of the automobile and the sale of such vehicle with the radio attached is subject only to a one-half of one per cent tax. In **Doby v. State,** 234 Ala. 150, 174 So. 233, 236, the Supreme Court of Alabama reaches a similar conclusion, holding, under Section 4 of the 1937 Alabama Luxury Tax Act (Acts 1936-37, Extra Session, p. 125) which exempted from the provisions of the Act "amounts received from the sale of used automotive vehicles, which vehicles are commonly known to the trade as second-hand automotive vehicles", that there was no sale of parts, accessory equipment, material and supplies used by the dealer, the owner, in reconditioning his cars before reselling them but that the sale was of the reconditioned car intact, and that the statute exempted the proceeds of such sale as a whole. The court uses the following language:

"To segregate the parts added in reconditioning the car, and fix a separate valuation of the proceeds of such parts for tax purposes, is to defeat the plain import of the exemption clause above quoted."

See also **Cody v. State Tax Commission,** 235 Ala. 47, 177 So. 146.

You are advised, therefore, that where there is a sale of a tractor trailer unit,—a truck tractor with trailer attached—as a unit, under facts as detailed by you, the tax should be collected as provided in Subsection (c) of Section 2, i.e., an amount equal to one-half of one per cent of the proceeds of the sale.

The fact that the auto license statutes require separate tags for the truck tractor and trailer can have no effect on the conclusions herein reached. The Legislature in the exercise of its sovereign power may impose license taxes as it sees fit, subject, of course, to constitutional limitations. See Ala. Digest, Licenses, Key No. 2; 18 Ala. Digest, Taxation, Key Nos. 3 and 5.

The Legislature has itself indicated its intention to include trailers within the term "motor vehicles" as used in revenue laws. Your attention is directed to Schedule 158(a) of the 1935 Revenue Act defining "motor vehicles". You will note the inclusion of the words "every vehicle * * * which is drawn by a self propelled vehicle." It is true that the Legislature there defines a "motor vehicle" while the act under consideration uses the term "automotive vehicle", but in common parlance these are one and the same things and in my judgment were so used by the Legislature.

The legislative imposition of separate licenses upon the truck tractor and the trailer, when the unit is operated on the State highways, does not, to my mind, indicate a legislative intent contrary to the conclusions arrived at above.

This holding is not to be understood as indicating that where the sale of a trailer is made separate from the sale of the truck tractor that the tax on such trailer is computed under Subsection (c) of Section 2 but, on the contrary, such trailer should be taxed as provided in Subsection (a) of Section 2.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 30, 1939.

Hon. Festus M. Shamblin,
Tax Assessor, Tuscaloosa County,
Tuscaloosa, Alabama.

Taxation—Homestead Exemptions—

Where a person has filed application or claim for homestead exemption on the form prescribed for that purpose by the State Department of Revenue, and since that time there has been no change in either the description or value of the property claimed exempt as a homestead, he does not, in returning his property for assessment in subsequent years, have to file another application or claim for home-

stead exemption on such form, the separate listing of the property claimed exempt as a homestead and the assertion of the claim for exemption on the same, on the regular return, sufficing.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of October 23, 1939, in which you request my opinion as follows:

"I will thank you to render me an official opinion on the following matter:

"A person in returning his property for assessment in prior years, has claimed a homestead exemption and filed the application or claim for homestead exemption on the form prescribed for that purpose by the State Department of Revenue, commonly known or referred to as 'Form No. 1.' Since the time that this claim or application for homestead exemption was filed on 'Form No. 1,' there has been no change in either the description or value of the property claimed exempt as a homestead.

"Query: In such a case, must the taxpayer in returning his property for assessment in subsequent years file another application or claim for homestead exemption on 'Form No. 1' in order to secure his homestead exemption, or will the claim of exemption made on the regular return of his property for assessment suffice, the description and value of the property claimed exempt as a homestead thereon being the same as the description and value of the property claimed exempt as a homestead in the application or claim which he has previously filed on 'Form No. 1'?"

In an opinion rendered to Hon. Madison L. Smith, Tax Assessor, Washington County, Chatom, Alabama, under date of October 5, 1937 (Quarterly Report of Attorney General, Vol. IX, page 10) it was held that the exemption of homesteads from State taxes under the provisions of Act No. 107 (General Acts 1936-37, page 113) approved February 20, 1937, constituted a tax gratuity which the taxpayer must assert, and that failing to do so, he waived the same.

In that opinion it was pointed out that pursuant to the provisions of Section 31 of the 1935 Revenue Act, as amended by Act No. 6, (General Acts, 1936, page 4) approved March 12, 1936, a person in returning his property for assessment must separately list and value the homestead.

It was also held in an opinion to Hon. Hunter Phillips, Tax Assesssor, Choctaw County, Butler, Alabama, under date of November 29, 1938 (Quarterly Report of Attorney General, Vol. XIII, page 87) that the State Tax Commission (now the State Department of Revenue), pursuant to the general superintendence of ad valorem taxes vested in it by the Legislature, and the specific authority given to it to prescribe the assessment forms upon which lands must be listed, could prescribe a special form for a person to use in asserting his claim of a homestead exemption, and that such a form having been prescribed, the person lost his tax gratuity if he failed to execute the prescribed form. It is my information that the form prescribed for the original assertion of a claim of homestead exemption is the form referred to in your letter of inquiry as Form No. 1.

In my opinion, when a person, in returning his property for assessment in prior years, has claimed a homestead exemption and filed the application or claim therefor on the form prescribed for that purpose, and since the time this claim or application was filed, there has been no change in either the description or value of the property claimed exempt as a homestead, the person, in returning his property for assessment in subsequent years, need not file another application or claim for homestead exemption on such form, in order to secure the same, provided he separately lists and values the homestead, and claims exemption thereon, on the regular return which he makes of his property pursuant to the provisions of Section 31 of the 1935 Act, as amended, supra, and the description and value of the property claimed exempt as a homestead on such return is the same as the description and value of the property claimed exempt as a homestead in the application or claim which he has previously filed on the form prescribed therefor.

Your attention is called, however, to the fact that it was also held in the opinion to Hon. Hunter Phillips, supra, that when an original application or claim for homestead exemption was made, or when there had been changes made in the description or value of the property claimed exempt as a homestead since the original application or claim was made, it was necessary for the person to make an original application or claim, or another application or claim, as the case might be, of a homestead exemption on the form prescribed by the State Department of Revenue for that purpose. That holding is here adhered to.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

October 30, 1939.

Hon. W. B. Phillips,
Member, House of Representatives,
Nicholsville, Alabama.

Act No. 224, Local Acts, 1939, approved August 11, 1939, providing for the election of the County Superintendent of Education of Marengo County, etc., held unconstitutional in part, as violative of Section 45 of the Constitution of Alabama, 1901.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 26, 1939, in which you request my opinion as follows:

"I want to get you to look up the bill I introduced in the House. It was passed and the Governor signed it.

"I want your opinion on it and tell me whether it will stand or not. I don't remember the number, but it is a bill to elect the Superintendent of Education by the people of Marengo County."

The act to which you refer in your letter of inquiry is Act No. 224, Local Acts, 1939, approved August 11, 1939, which originated as H. B. 481 and was introduced by you.

My answer to your request is predicated on the assumption that the Journals of the respective houses of the Legislature disclose that proper notice of intention to introduce the local bill out of which this act grew was given, and that there was a compliance with the other steps required by the Constitution for the passage of an act. I am unable to consult the Journals of the respective houses of the Legislature at this time, because they are now being prepared for publication and are not available.

The title to this Act reads as follows:

"To provide for the election of a County Superintendent of Education for Marengo County, Alabama, to fix his term of office, to prescribe his salary, and the manner of payment; to define his qualifications, powers and duties; to provide for his election at the next State general election to be held in November, 1940, and to provide for the election of his successor in office."

Section 4 of the Act provides in pertinent part:

"Provided, however, that the Board of Education may, in addition thereto, allow to said County Superintendent of Education of Marengo County, Alabama, an amount not exceeding $300.00 per annum for necessary traveling expenses, and may also, in addition thereto, allow the said County Superintendent of Education of Marengo County, Alabama, a sum not exceeding $100.00 per month for secretarial and other office help."

In my opinion, this part of Section 4 of the Act violates that portion of Section 45 of the Constitution of Alabama of 1901 which reads:

" * * * Each law shall contain but one subject which shall be clearly expressed in its title (here follow exceptions not applicable) * * *."

It will be noted that the title of the Act makes no mention of expenses of any kind or any allowance to the Superintendent of Education for expenses of any kind; nor does it provide in any way for the employment of secretarial and other office held, or for an allowance to the Superintendent of Education for secretarial and other office help.

It has been repeatedly held by our Supreme Court that the subject matter embraced in the body of an act must be expressed in the title. **Bradley v. State,** 99 Ala. 177, 13 So. 415; **State v. Davis,** 130 Ala. 148, 30 So. 344.

I am aware of the rule of construction that where there is a fair expression of the general subject of an act in its title all matters reasonably connected with it, and all proper agencies or instrumentalities or measures

which may facilitate its accomplishment, are proper to be incorporated in the act, and are usually said to be cognate or germane to the title. **Lindsay v. U. S. Savings Co.,** 120 Ala. 156, 24 So. 171; **Chapman v. Railway Fuel Co.,** 212 Ala. 106, 101 So. 879.

Nevertheless, I do not think it can be said that provision for an allowance to the Superintendent of Education for necessary traveling expenses or provision for an allowance to him for secretarial and other office help can be said to be cognate or germane to the title of a bill which provides only for the election of the Superintendent of Education, the fixation of his term of office, the prescribing of his salary and manner of payment, the definition of his qualifications, powers and duties, and the election of his successor. Cf. **Patton v. State,** 160 Ala. 111, 49 So. 805; **Benton, Judge, et al. v. State ex rel. City of Girard,** 168 Ala. 175, 52 So. 482. Certainly, these provisions could not be referable to that portion of the title providing for the fixing of the salary of the Superintendent. Nor do I think it could be said that they are referable to that portion of the title defining the qualifications, powers and duties of the Superintendent. Cf. **Woodruff v. Beeland,** 226 Ala. 652, 127 So. 235. Certainly, by no stretch of the imagination could they be referable to any other portion of that title.

While I am not unmindful of the firmly established principle of law that a statute should not be declared unconstitutional unless its unconstitutionality appears beyond all reasonable doubt, yet I am constrained to hold that part of Section 4, supra, unconstitutional as violative of Section 45 of the Constitution of Alabama of 1901 for the reasons above indicated.

The fact that this part of the Act is unconstitutional does not, however, render the other parts of the Act unconstitutional, since the other parts thereof are distinct and separable from the unconstitutional part. If the unconstitutional part of a statute is perfectly distinct and separable from the other parts thereof, and they are not dependent one on the other, the Courts, while striking down the unconstitutional part, will permit the other parts to stand, provided effect can thus be given to the legislative intent. See **Bradley v. State,** supra, and authorities therein cited.

It might be stated that the other parts of the Act have been examined and that no constitutional objection to them occurs to me, nor has any been suggested.

On the subject of an allowance to the Superintendent of Education for stenographic and other assistance, and for necessary furniture, office equipment, stationery, postage, forms, and supplies, I respectfully refer you to Section 169 of the Alabama School Code of 1927, which provides as follows:

> "Section 169. Assistants to County Superintendent, Office, Etc.—The County Board of Education may in its discretion provide upon the nomination of the County Superintendent of Education, at least the following assistants: an elementary school supervisor and a statistical and stenographic clerk. No person shall be eligible for appointment as such supervisor who does not hold a certificate of administration and supervision as required of County Superintendents of Education. The County Board of Education may employ additional clerical and professional assistants, including health supervisors, and may reimburse them for all actual traveling expenses necessary in the performance of their official duties.

The County Superintendent is hereby required to maintain an office at the County seat. The County Board of Revenue or Court of County Commissioners shall provide the County Superintendent of Education and his professional and clerical assistants with ample, convenient and comfortable office quarters. The County Board of Revenue or Court of County Commissioners shall also provide necessary furniture, office equipment, stationery, postage, forms, and supplies required by the County Superintendent of Education and his assistants."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 30, 1939.

Hon. J. Charles Stanley,
Tax Assessor,
Calhoun County,
Anniston, Alabama.

Taxation—Tax Assessors—Municipal Taxes—Escapes—

Tax Assessors assessing real estate located within municipalities which have elected to come under the provisions of Section 201 of the 1935 Revenue Act, as amended, shall assess such real estate for municipal taxes, in the same manner as State and county taxes are assessed.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion under date of October 18, 1939, which reads as follows:

"Kindly give me an opinion on following question of assessment. An Act authorizing the Assessor of Calhoun County to assess and Tax Collector to collect City Tax of Anniston, Alabama, beginning October 1, 1939. I have an escape for taxes on a certain lot for 5 years. In making up this assessment, should I assess city taxes for the full number of 5 years?"

In the above request you refer to an Act authorizing you as Tax Assesssor of Calhoun County to assess and the Tax Collector of Calhoun County to collect taxes for the City of Anniston. I assume by the use of the word "act" you refer to an ordinance passed by the governing body of the City of Anniston under the authority of Section 201 of the 1935 Revenue Act, authorizing you to assess taxes for said city. This opinion is based on the assumption that the governing body of said city has adopted such an ordinance.

You are advised that in my opinion you should assess as an escape from city taxes the lot in question for the past five years.

I call your attention to Section 201 of the 1935 Revenue Act, as amended by Act No. 59, page 67 of the General Acts of 1939, which, is here pertinent, provides:

"Section 1. That said Section 201, Article VI, of an Act of the Legislature of Alabama entitled, 'An Act to provide for the General Revenue of the State of Alabama,' approved July 10, 1935, be and the same is hereby amended so as to read as follows:

"Section 201. Any municipal corporation in this State, may, by ordinance duly adopted, provide for the assessment, equalization and collection of taxes due such municipality, by the officers and boards provided in this Chapter, and all the machinery herein provided for the assessment, equalization and collection of State and county taxes, the enforcement of such collection, the sale of property for the collection of taxes and the redemption from such sales, shall be applicable to the assessment and collection of such municipal taxes."

It will be noted that the above quoted Section 201, as amended, makes all of the machinery provided for the assessment and equalization and collection of State and County taxes, applicable to the assessment of city taxes in all cities that have elected by ordinances to come under the provisions thereof.

Your attention is further called to Section 45 of the 1935 Revenue Act, which reads in pertinent part as follows:

"Section 45. Whenever the Tax Assessor shall discover that any property has escaped taxation in any assessment within five years next preceding the current year, he shall list, return and value said property for assessment for the years during which same has escaped taxation, and shall also endorse on such returns the year or years for which the property has escaped taxation, and the accrual of a penalty of ten per cent of the taxes assessed thereon for each year."

I also call your attention to Section 2142 of the 1923 Code of Alabama, which reads as follows:

"2142. Taxes; escaped taxes; assessment for.—At any time within five years after property has escaped taxation the council or board of assessors shall have the right to make assessments against such property for such escaped taxes or against the person owning such property, and such taxes shall be collected by certification to a court having equity jurisdiction, as in other cases, or by the levy of execution herein provided. And for any informality or irregularity in any assesssment, they shall have the right to make a re-assessment against such property at any time within five years."

Therefore, since the Legislature has set up the machinery for the assessment of property which has escaped State and county taxation, and municipal corporations have a similar machinery set up by Section 2142, supra, it necessarily follows that the same machinery used in assessing escape State and county property is applicable for assessment of property which has escaped city taxation, in all cities which have elected to come under the provisions of Section 201, as amended, supra.

Your attention is called to an opinion of this office rendered to Hon. J. Collier Merrill, Quarterly Report, Attorney General, Vol. XV, page 231. Subheads 18 and 19 of this opinion deal with the collection of uncollected city taxes before and after the 1939 amendment to Section 201. The uncollected municipal taxes referred to in this opinion are taxes that have been assessed by the municipal authorities prior to the invocation of the aid of Section 201, supra, as amended, but not collected. In the instant case, you are confronted with the assessment of taxes that have never been assessed by the city authorities, and the date of the adoption of the ordinance by the City of Anniston invoking the aid of Section 201, supra, as amended, would have no effect on your situation. I adhere to all of the holdings of the opinion hereabove referred to, and this opinion is in no way in conflict therewith.

It is my opinion that after a city has adopted the ordinance as provided by Section 201, as amended, supra, the Tax Assessor should assess city taxes in the same manner that State and County taxes are assessed. This, in my opinion, applies to escaped city taxes as well as other city taxes.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 1, 1939.

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

License tags—Motor vehicles—Station wagon designed for carrying freight or merchandise held liable for truck license.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of October 19, 1939, in which you request my opinion as follows:

"Please advise the proper license to issue for a 'station wagon.'

"As I understand a station wagon is something designed to carry freight and sometimes passengers. A resident of this City uses his station wagon to carry his help to and from his home, which is located several miles out of town. Other times he uses it to haul produce, tools etc.

"I have been issuing truck tags in past on account of design of station wagon but the question has arisen now that a private tag should be issued."

In my opinion, a station wagon, as that vehicle is commonly understood, should carry a truck license tag.

A motor truck is defined under Schedule 158(j) as:

> "Any motor-propelled vehicle designed for carrying freight or merchandise or drawing a semi-trailer truck on not more than two axles and not operated or driven on fixed rails or tracks; but it shall not include self-propelled vehicles equipped primarily for passenger transportation."

My observation of the vehicle commonly described as a "station wagon" is that it consists of a regular automobile chassis with a box-like body having a stationary driver's seat and bench-like seats extending from one side of the body to the other in the back end thereof, which seats may be easily removed to permit the hauling of freight. The vehicle is designed to carry freight and, in my judgment, the mere fact that it is so constructed as to permit its use as a private car cannot bring it within the exception set forth in Schedule 158(j) that the schedule "shall not include self-propelled vehicles equipped primarily for passenger transportation."

In my judgment, a station wagon is a "truck" within the meaning of Schedule 158(j) and should properly carry a truck tag.

Your attention is also invited to an opinion rendered by this office to Hon. Henry S. Long, Chairman, State Tax Commission, under date of September 3, 1936, (Quarterly Report of Attorney General, Vol. IV, p. 173) holding a "sedan delivery" liable for truck license and an opinion rendered under date of September 27, 1937, to Hon. Simon Wampold, Chief Clerk, Probate Office, Montgomery County, Montgomery, Alabama, (Quarterly Report of Attorney General, Vol. VIII, p. 332) dealing with the liability of automobiles used for the purpose of collecting and delivering clothes for cleaning.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 1, 1939.

Hon. Wm. J. Kern, Clerk,
Circuit Court, Mobile County,
Mobile, Alabama.

The Clerk of the Circuit Court, when acting as Clerk of the Inferior Civil Court of Mobile, is entitled to $1.50 for approving attachment bond and affidavit, 50c for approving bond in garnishment and detinue suits and 25c for administering oaths and certifying the same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 26, 1939, in which you request my opinion as follows:

"Please enlighten me as to the following at your earliest convenience:

"In the Schedule of Costs for the Inferior Civil Court of Mobile, which is the same as Justice of the Peace Costs, fixed by the 1923 Code, there is a provision therein with respect to

"Attachment Bond and Affidavit $1.50,

and on the eleventh line below:

"Every other Bond ..... .50

"Has the Clerk of this Court the right to charge $1.50 for the issuance of a Garnishment Bond and Affidavit and also $1.50 for the issuance of Detinue Bond and Affidavit under the heading of Attachment Bond and Affidavit, or must he charge but the .50 under the heading of 'every other Bond' and .25 for administering an oath and certifying the same when the suit is brought in Detinue or Garnishment with Bond in aid of pending suit? In other words, with respect to taxing costs, would a Garnishment with Bond, and a Detinue with Bond, be considered the same as an Attachment"

Garnishment is a form of attachment, yet under our system of jurisprudence it is a separate and distinct process and is governed by its own method of enforcement and provisions as to costs.

You state that the fees of officers for performing their duties in the Inferior Civil Court of Mobile are the same as are provided for justices of the peace. This being true, I call your attention to Section 7289, Code of Alabama, 1923, and especially to the sub-paragraph of this section where it says, "Attachment bond and affidavit—$1.50."

It is my opinion that this fee could not be made to apply to garnishment and detinue bonds as it specifically states, "Attachment bond and affidavit." Therefore, I am of the opinion that the following provision of Section 7289, which is a general provision, may be applied to garnishment and detinue bonds: "Every other bond—50c."

You are entitled to 25c, as provided by Section 7289, supra, for "Administering an oath and certifying the same."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 1, 1939.

Hon. Ernest L. McClure,
Clerk, Circuit Court,
Lauderdale County,
Florence, Alabama.

Where a defendant is sentenced to hard labor for the county to pay fine and costs and such fine and costs are afterwards paid to the clerk of the circuit court, this fine, together with the costs, should be remitted to the State Treasurer and credited to the Convict Fund.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 20, 1939, in which you request my opinion as follows:

"When a Defendant has been sentenced to hard labor for Lauderdale County for a period of 20 days to pay a fine of $50.00, and has been sentenced to hard labor for the County for a period of 65 days to pay court costs amounting to $48.10, and was given additional hard labor sentence of 3 months, all of which was for Violating the Prohibition Law and has been delivered to the Convict Department at Montgomery, Alabama, and has served his 3 months additional hard labor and has paid the fine of $50.00 and costs of $48.10. To whom should the Clerk of the Court remit the fine and costs?"

This office has heretofore held that where a defendant is sentenced to hard labor for nonpayment of costs and is delivered to the State penitentiary and the State Department of Corrections and Institutions pays the costs, as provided in Section 3667, that costs subsequently paid by such convict in lieu of working out such costs must be remitted to the State Treasurer to be credited to the funds of the Department of Corrections and Institutions.

I refer you to Biennial Report of Attorney General, 1936-38, page 79; Quarterly Report of Attorney General, Vol. VI, page 19.

The same conclusion has been reached in regard to a fine paid by a convict subsequent to the time he is received in the State Penitentiary. Such fine should be remitted to the State Treasurer to be credited to the funds of the Department of Corrections and Institutions. Quarterly Report of Attorney General, Vol. III, page 188.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

November 1, 1939.

Hon. M. E. McConnell,
Judge of Probate,
Sumter County,
Livingston, Alabama.

Where a mortgage has been foreclosed by a Federal Land Bank and the land has been redeemed within the period allowed by law, and the Federal Land Bank executes the deed to the party redeeming, such deed, when offered for record, is subject to the State filing tax.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 21, 1939, in which you request my opinion as follows:

"A redemption deed has been filed in my office wherein the Federal Land Bank of New Orleans is grantor. The property conveyed in this redemption deed was foreclosed on by the Federal Land Bank in the usual procedure, and the property has now been redeemed by the grantor of the mortgage.

"I would appreciate your advising me as to whether the above mentioned redemption deed is subject to the state deed tax or not."

It is my opinion that prior to the recordation of the instrument mentioned by you in your letter you should collect a filing tax thereon, as provided in Schedule 46 of Section 348 of the General Revenue Act of 1935.

This office has ruled, in construing Schedule 46, supra, that where a mortgage was given to the Federal Land Bank, no mortgage tax should be paid on filing the instrument for record, and that when a deed to the same property from the Federal Land Bank was offered for record by the grantee therein there was nothing to deduct; and that a deed tax should be collected on the entire value of the property conveyed. Biennial Report of Attorney General, 1926-28, page 410; Quarterly Report of Attorney General, Vol. XIV, page 99.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

November 2, 1939.

Hon. John H. Peach, Jr.,
Executive Rate Clerk,
Transportation Bureau,
Alabama Public Service Commission,
Montgomery, Alabama.

Motor Carrier Act—Broker—

A broker, in the absence of any special contract to the contrary, who charges a delivery or transportation fee for delivering goods purchased by him to his customer, is exempt from compliance with the Alabama Motor Carrier Act of 1932.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated October 26, 1939, which reads as follows:

"A flour salesman contacts retail merchants in various sections of the state and takes orders for flour. Prices quoted by him are F. O. B. the customers shipping point. He has carloads of flour consigned to himself in Birmingham and, at the present time, ships the flour from Birmingham to his customers by rail or by some other public carrier. He now desires to haul the flour from Birmingham in his own trucks and to collect from his customers, in addition to the charge for the flour, a reasonable transportation charge.

"We desire an official expression from you as to whether or not the motor carrier operation described above is subject to an Act of the Legislature approved October 28, 1932, (H. B. 113)."

From the facts detailed in your letter, coupled with other information you have furnished me, I find that the flour salesman here under consideration does not represent any particular flour company, but operates as a broker; that he takes orders for flour from retail merchants in various sections of the state and supplies these orders with flour which he buys and has shipped to him in Birmingham, Alabama; that he now wants to use his own trucks in delivering the flour thus purchased by him to his customers and to collect from said customers, in addition to the price of the flour, a reasonable transportation charge.

Under the above facts, I do not think that the collection of the delivery or transportation charge by the broker from the retailer makes it necessary for him to obtain a license as a contract carrier. The Act of 1932 defines contract carrier as: "Any operator of a motor vehicle who engages in the business of furnishing transportation of persons or property for hire for a particular person or particular persons under a special contract or special contracts, and not for the public." The Act provides further that the words:

"'Contract carrier' shall not be construed to mean or include: Any farmer, merchant, manufacturer, or any other person, firm, association or corporation who transports only his own property."

Cf. Opinion of this office to Hon. Hugh White, President, Alabama Public Service Commission, Montgomery, Alabama, Biennial Report of Attorney General, 1932-34, page 636.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 6, 1939.

Hon. C. B. Goldthwaite, Secretary,
Alabama State Board of Pharmacy,
Troy, Alabama.

Pharmacy—An applicant, who graduated in 1924 from a Grade A school or college of pharmacy, or department of pharmacy of a university, whose requirements at that time were not less than the present minimum requirements for membership in the American Association of College of Pharmacy, recognized by the Board of Pharmacy, and who meets the other requirements of the 1931 Pharmacy Act, is entitled to take examination for registration as a pharmacist.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of November 3, 1939, in which you request my opinion as follows:

"Section 7 of the Pharmacy Act of 1931 to regulate the practice of pharmacy, states the requirements for registration. Under said Act the educational requirements are that applicant be a graduate of a Grade A School or college of pharmacy, or department of pharmacy of a university whose minimum requirements are not less than the minimum requirements for membership in the American Association of College of Pharmacy, recognized by the Board of Pharmacy. One of the minimum requirements for membership in the American Association of College of Pharmacy is a four-year course in Pharmacy.

"We have an application for examination for registration from a party who graduated in 1924 from a then recognized college and who received a B. S. degree in pharmacy. Said party took a four-year course although at that time only two years were required to receive said degree. The college from which he graduated was recognized by the Board at the time of graduation and is now recognized by the Board in view of the fact that it now has the required four-year pharmaceutical course.

"If said party can meet all the other requirements of the act as to moral character and practical service and experience training, as defined in said act, would he be eligible for examination for registration as a pharmacist under the 1931 Act?"

I am of the opinion that your inquiry should be answered in the affirmative, provided the Board of Pharmacy finds, as a matter of fact, that the school offering the pharmaceutical course from which the party in question graduated in 1924, at that time, met the present minimum requirements of the American Association of College of Pharmacy, including a four-year pharmaceutical course.

Section 7 of Act No. 322, S. 136, approved July 1, 1931 (General Acts of 1931, page 377), provides, in part, as follows:

> "Section 7. REQUIREMENTS FOR REGISTRATION AS PHARMACIST: MUST BE GRADUATE IN PHARMACY, ETC.; RETAIL PHARMACY EXPERIENCE REQUIREMENTS; ACTUAL COLLEGE ATTENDANCE NOT TO EXCEED THREE (3) YEARS CREDITED ON REQUIRED FOUR (4) YEARS' TRAINING; MINIMUM OF ONE (1) YEAR DRUG STORE EXPERIENCE EVEN IF FOUR (4) YEAR GRADUATE. Every applicant for examination and registration as a pharmacist shall not be less than twenty-one (21) years of age, of good moral character and temperate habits, a graduate of a grade A school or college of pharmacy, or department of pharmacy of a university, whose requirements are not less than the minimum requirements for membership in the American Association of College of Pharmacy, recognized by the Board of Pharmacy, and shall file proof satisfactory to the Board, substantiated by proper affidavits, of sufficient service and experience in a retail pharmacy, under the supervision of a registered or licensed pharmacist, to make a total, together with actual time of college attendance, of at least four (4) years of pharmaceutical training; and shall pass an examination by the Board of Pharmacy; Provided, that in all cases the actual time of attendance at school or college of pharmacy, or a department of pharmacy of a university, to be credited on the required four (4) years of pharmaceutical training, shall not exceed three (3) years. Service and experience in a retail pharmacy under the supervision of a registered or licensed pharmacist as required in this section shall be predominantly related to the selling of drugs, compounding physician's prescriptions, preparing pharmaceutical preparations, and keeping records and making reports required under the State and Federal statutes. * * *"

It will be seen from the above that four years of pharmaceutical training, as defined therein, together with other qualifications, are necessary to make one eligible for examination for registration. The pharmaceutical training is divided into two categories, viz: (1) Training in a grade A school or college of pharmacy, or department of pharmacy of a university, whose requirements are not less than the minimum requirements for membership in the American Association of College of Pharmacy, recognized by the Board of Pharmacy, and graduation therefrom; and (2) practical service and experience training as therein defined. There is no specification as to how much time is required in each category, except that not more than three of the four years can be credited to school or college training. There is no mandatory provision that school or college training amount to four years. Also, the act is silent as to time of graduation. The status of the school or college at the time of graduation rather than the status at the time of the application for registration is controlling, but at the time of graduation the school must have met present requirements. Cf. **Quarterly Report of Attorney General, Vol. XIV, page 283.**

Your inquiry is based on the condition that if the party in question can meet all the other requirements of the act as to moral character and practical service and experience training, as above defined, will he be eligible for

registration for examination as a pharmacist under the Act of 1931. Therefore, this opinion will be limited to only the educational qualifications.

You state that one of the present minimum requirements for membership in the American Association of College of Pharmacy is that the school have a four-year course in pharmacy. You further state that in 1924 only a two-year course was required for recognition. An applicant for registration for examination at this time must meet the requirements of the 1931 Act, i.e., have completed a four-year course in pharmacy as now required by the American Association of College of Pharmacy. The fact that in 1924 a two-year course was recognized is immaterial.

Under your statement of facts, the party in question took a four-year course, although at the time only two years were required to receive a degree. If said party only took two years of pharmaceutical work and graduated he would not be eligible for registration for examination as a four-year pharmaceutical course now is required for a school to be recognized by the American Association of College of Pharmacy. However, if the Board of Pharmacy determines, as a matter of fact, that the party in question took a four-year pharmaceutical course and graduated in said course in 1924 from a school that at that time (in 1924) met the present minimum requirements of the American Association of College of Pharmacy including a four-year pharmaceutical course, and he meets the other requirements of the 1931 Act, I am of the opinion he would be eligible to take examination for registration.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 6, 1939.

Hon. A. R. Forsyth,
Director of Finance,
Capitol.

Alabama Beverage Control Act—

1. Beneficiaries of profits derived from State Liquor Store held entitled to same as of last day of month in which such profits are earned.

2. Act No. 401, H. B. 886, approved September 15, 1939, held to relate only to net profits derived from proceeds of State Liquor Store in each calendar year after the year 1939.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of November 2, 1939, in which you request my opinion as follows:

"Heretofore the profits derived from the State Liquor Stores have been distributed monthly.

"As of January 1, 1940, profits of the Liquor Stores are to be distributed semi-annually in the following ratio:

"50% to the General Fund

10% to the State Department of Public Welfare

10% to the Counties for their General Funds

10% to the Counties for public health and other purposes

20% to the Municipalities where Liquor Stores are located.

"These distributions are of profits up to $2,000,000.00.

"The excess of $2,000,000.00 up to $200,000.00 shall be paid to the incorporated towns semi-annually, according to population.

"The excess of $2,200,000.00 shall be paid to the General Fund:

"The following question arises:

" 'As of September 30th (the end of the fiscal year), and each month, the Accounting Department of the Alcoholic Beverage Control Board credits the several beneficiaries of the profits with their proportionate amounts but the payments are not made until the following month, usually about the 20th. The incorporated towns will not share in the earnings for the months of October, November and December, 1939 if these profits are considered as distributable as of the months in which they are earned; but if the distribution is to be considered as appropriations to the beneficiaries as of the date the beneficiary receives the money, then the profits for December 1939 must be considered as of January and be included in the calculations for the calendar year 1940 in determining what proportion is earned above $2,000,000.00.'

"Please instruct me as to whether or not these profits shall be considered as belonging to the beneficiaries as of the 30th of the month in which such profits are earned, or shall be considered as belonging to the beneficiaries as of the date upon which the payments are made to them by the Alcoholic Beverage Control Board."

In construing a statute, one of the fundamental rules of statutory construction is to ascertain and give effect, if possible, to the intention of the Legislature, and that intention, when ascertained, is the law itself. **City of Birmingham v. Southern Express Co.**, 164 Ala. 529, 51 So. 159; **Davis v. Thomas**, 154 Ala. 279, 45 So. 897; **Sunflower L. Co. v. Turner S. Co.**, 158 Ala. 191, 48 So. 510.

A prime aid in determining the legislative intent is the language of the statute itself. It has been repeatedly held that where the statutory language is clear and the intent is obvious, there is no room for construction and in such a case the language should be given the meaning therein plainly ex-

pressed, the court having discretion in construing statutes only where the meaning is doubtful. **City of Birmingham v. Southern Express Co.,** 164 Ala. 529, 51 So. 159; **L. & N. R. R. Co. v. Western Union Telegraph Co.,** 195 Ala. 124, 71 So. 118; **Kreutner v. State,** 202 Ala. 287, 80 So. 125; **Tucker v. McLendon,** 210 Ala. 562, 98 So. 797; **State v. Praetorians,** 226 Ala. 259, 146 So. 411; **Abramson v. Hard,** 229 Ala. 2, 155 So. 590; **State v. Tuscaloosa Building & Loan Association,** 230 Ala. 476, 161 So. 530; **Bozeman v. State,** 7 Ala. App. 151, 61 So. 604; certiorari denied Ex parte Bozeman, 183 Ala. 91, 63 So. 201; **Daley v. State,** 13 Ala. App. 310, 69 So. 338; **State v. H. G. Fain Service Station,** 23 Ala. App. 239, 134 So. 119, certiorari denied 220 Ala. 55, 124 So. 121.

Applying these rules to the case at hand, it must at once appear, that the language of Act No. 401, H. B. 886, approved September 15, 1939, adequately reveals the legislative intent—expressed with such preciseness of language and clearness of terminology as to permit no doubt regarding its meaning—"The net profits derived from the proceeds of the State Liquor Stores in each calendar year **after the year 1939** under the provisions of the Alabama Beverage Control Act * * * shall be paid out semi-annually" etc. It cannot be imagined that the profits derived from the proceeds of the State Liquor Stores in October, November and December, 1939, are "profits derived * * * in each calendar year after the year 1939."

The obvious fallacy of any contention that "the distribution of these funds to the several beneficiaries is to be considered as an appropriation to each of such beneficiaries as of the date the beneficiary receives the money" is that such contention rests on a failure of consideration of the provision of Subsection (c) of Section 9 of the Alabama Beverage Control Act of 1936-37 (General Acts, 1936-37, p. 40) (which Act controls the distribution of the October, November and December profits) that these net profits "shall be **paid out** and applied **monthly**" and, further, that "payment" is to be made "not later than the 20th day of each month following collection." This provision contained in Subsection (c) of Section 9 of the 1936-37 Alabama Beverage Control Act clearly reflects the legislative intention, not to make "an appropriation to the beneficiaries as of the date they received the money", but to effect a distribution of such moneys as of the months in which earned —allowing, of course, a reasonable time (not later than the 20th of the month following the month in which such moneys are collected) after such date of collection to distribute the moneys collected.

You are, therefore, advised that the profits derived from the proceeds of the State Liquor Stores during the months of October, November and December should be considered as belonging to the beneficiaries as of the last day of the month in which such profits are earned.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 7, 1939.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Licenses—Motor vehicles—Alabama National Guard—Act No. 511, H. B. 162, approved September 14, 1935 (General Acts, 1935, p. 1099)—

Duty of Probate Judge to issue tag for "passenger vehicles owned and operated by the Federal Government or by officers and enlisted men actually serving in the United States Army who are assigned by the War Department as Instructors and/or Sergeant-Instructors with the Alabama National Guard of Alabama and of commissioned officers of the Active National Guard of Alabama."

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of October 19, 1939, in which you request my opinion as follows:

"The 1935 Acts of Alabama on page 1099 provides that there shall be exempt from the operation of the privilege or license tax and registration fee now and or hereafter to be levied on automobiles and motor vehicles within the State of Alabama, passenger vehicles owned and operated by the Federal Government or by officers and enlisted men actually serving in the United States Army who are assigned by the War Department as Instructors and/or Sergeant-Instructors wth the National Guard of Alabama and all commissioned officers of the Active National Guard of Alabama.

"Certain Probate Judges in Alabama are refusing to issue license tags to the above named officials even when said officials comply with the instructions contained in said Act. The said Probate Judges claim that they cannot issue the tags without the money being paid therefor as required by law.

"I, therefore, request that you issue an opinion directed to me to the effect that it is the duty of the Probate Judges to issue the license tags to the officers named in said Act of 1935 found on page 1099."

The act to which you refer in your letter of inquiry is Act No. 511, H. B. 162, approved September 14, 1935 (General Acts, 1935, p. 1099).

It appears that the question raised in your letter of inquiry has heretofore been considered and determined by this office in opinions to Hon. Alex Brantley, Judge of Probate, Pike County, Troy, Alabama, under date of November 14, 1935, (Quarterly Report of Attorney General, Vol. I, p. 172) and to Brigadier General John C. Coleman, The Adjutant General, Montgomery, Alabama, under date of November 12, 1935, (Quarterly Report of Attorney General, Vol. I, p. 166).

In the opinion to Judge Brantley, this office advised him in response to his inquiry as to the proper person to issue the tag under the Act, supra, i. e., the Probate Judge or the State Tax Commission or the Adjutant General, as follows:

"In answer to your second inquiry, it is my opinion that the Probate Judge of the County where the motor vehicle is ordinarily kept or stored, is the proper officer to issue the motor vehicle tag to the exemptioner. The language used to express the meaning of the Act is not entirely clear. However, it must be kept in mind that the Act was dealing with officers of the United States as well as officers of the State and with civil officers as well as with military officers.

"In my opinion, the phrase 'said official of the State of Alabama, etc.' was used to distinguish the civil from the military officers dealt with therein and that the word 'said' as used in that phrase refers to and is demonstrative of the official to whom presentation of proper identification certificate must be made.

"It is to be noted that immediately following this particular phrase is the phrase 'without, however, charging the usual fee for registration or licensing of said vehicle.' The Probate Judge is the official who charges, that is, collects, the license or registration fee levied upon motor vehicles.

"From a consideration of the whole Act it is apparent that the Probate Judge is the official designated therein to issue the motor vehicle tag."

In the opinion to General Coleman, the question of whether or not the Probate Judge was entitled to a fee of fifty cents for issuing the tag under the Act, supra, was dealt with in the following language:

"That part of your inquiry pertaining to the fifty cent fee of the Probate Judge for issuance of a tag to the persons exempt from payment of the motor vehicle license or registration tax, must be answered in the negative.

"The law of fees and costs must be strictly construed and an officer may not take a fee for a service rendered unless he can point to specific authority therefor. Schedule 158.20 of Chapter 6, Article XIII of the Revenue Bill of 1935 provides:

" 'The Probate Judge for issuing the license required by this Chapter of this Article, shall be allowed a fee of fifty cents for issuing each license for operating motor vehicle, which shall be paid to the Probate Judge by the owner at the time of the issuance of the license tag.'

"The fee is allowed to the Probate Judge for 'issuing the license.' The persons designated in the Quarles Act are exempt from the license and therefore none is issued by the Probate Judge to them. The Probate Judge is therefore not entitled to the fifty cent issuance fee."

This position was reaffirmed in the opinion to Judge Brantley, supra.

I respectfully invite your attention to both of these opinions.

The premises considered, it is my opinion that it is the duty of the Probate Judge of the county where the motor vehicle is ordinarily kept or stored to issue a tag under the Act, supra, for "passenger vehicles owned and operated by the Federal Government or by officers and enlisted men actually serving in the United States Army who are assigned by the War Department as Instructors and/or Sergeant-Instructors with the Alabama National Guard of Alabama and of commissioned officers of the Active National Guard of Alabama."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 7, 1939.

Hon. Ernest L. McClure,
Clerk, Circuit Court,
Lauderdale County,
Florence, Alabama.

Elections—General and Primary—

Elector must cast his ballot within the polling place in either of such elections, there being no provision of law for an election inspector or election inspectors to carry a ballot outside the polling place to permit a disabled elector to cast the same.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 3, 1939, in which you request my opinion as follows:

"Is there any provision of law for the Inspector or any holders of an election to carry a ballot to a car and permit a disabled elector to vote."

I know of no provision of law for an inspector or inspectors of an election to carry a ballot outside the polling place for the purpose of permitting a disabled elector to cast the same, in either a general or primary election.

On the contrary, there are express provisions of law, pertaining to both general and primary elections, which clearly and definitely provide that all ballots must be cast within the polling place.

Section 490 of the Code of Alabama, 1923, pertaining to general elections, provides:

"Section 490. Electors who may have assistance of ticket fixer to prepare ballot.—Any elector applying to vote who shall state to any of the inspectors that by reason of his inability to write the English language, or by reason of blindness or the loss of the use of his hand or hands, he is unable to prepare his ballot, may have the assistance of any person he (he) may select. **In such case said elector must remain within the polling place and the inspector shall send for the person selected; if the person can not be found, then any other person such elector may select. An elector who prepares his ballot alone or with the assistance of another shall be permitted to prepare it at any point in the polling place.** Any person called in to assist an elector in preparing his ballot, shall retire when the elector retires. No more than ten electors shall be allowed in the polling place at the same time. **No elector shall remain more than five minutes in, nor shall he be permitted to take his ballot from the polling place.**. In cities or towns of more than three thousand inhabitants, each elector on receiving the ballot shall forthwith **and without leaving the polling place retire alone** to one of the booths or compartments provided for that purpose, and there prepare his ballot in the manner herein provided. Any elector applying to vote in such city or town who shall state under oath to any of the inspectors, which said oath may be administered by any one of the inspectors, that by reason of his inability to write the English language, or by reason of blindness or the loss of the use of his hand or hands, he is unable to prepare his ballot, may have the assistance of any person he may select. In such case, **said elector must remain within the polling place and the inspector shall send for the person selected. If the person can not be found, then any other person such elector may select, and thereupon said elector and the person so selected shall retire to a booth or compartment,** and there the person so selected shall render said elector all such assistance in the preparation of said ballot as he may require, so that the same may be voted for the candidate of his choice, in the manner herein provided. In all other respects, said elector shall vote as is required of other electors." (Emphasis supplied)

Section 22 of Act No. 56, H. B. 873, approved February 25, 1931 (General Acts, 1931, p. 73), and generally known as the 1931 Primary Act, provides:

"Section 22. That if a qualified elector is unable to read or is so physically disabled that he cannot make his cross mark on a ballot, and request assistance in preparing his ballot, the inspector shall swear him as to such disability, and thereupon no more nor less than two inspectors shall assist such voter by one of them in the presence of the other inspector, marking his ballot as he directs. **Each elector in preparing his ballot shall prepare the same in the room or place where such election is being held, and not elsewhere."** (Emphasis supplied)

It can be readily seen from a reading of the provisions of our statutory law above quoted that all ballots cast in either a general or primary election in this State should be cast in the polling place. Cf. Opinion to the Judge of Probate, Coffee County, Enterprise, Alabama, under date of October 28, 1930, (Biennial Report of Attorney General, 1930-1932, p. 13).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 7, 1939.

Hon. D. C. Nix,
Sheriff, Franklin County,
Russellville, Alabama.

Alabama Beverage Control Act—

Stamped or identified alcoholic beverages, i. e., alcoholic beverages originally purchased in accordance with the provisions of the Alabama Beverage Control Act, which are possessed in a dry county in Alabama, should be condemned in accordance with the provisions of the appropriate sections of Article 11 of Chapter 167 of the Code of Alabama, 1923, whether the seizure is made by the sheriff or his deputies, or by a representative or representatives of the Alabama Alcoholic Beverage Control Board, the said sections of the old prohibition laws not having been repealed in this respect by the provisions of the Alabama Beverage Control Act.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of October 30, 1939, in which you request my opinion as follows:

"Franklin County voted dry and is a dry county. If I, as Sheriff of Franklin County seized several cases of whiskey from a person who has illegal possession of that whiskey in Franklin County and the liquor had previously been purchased from a state liquor store by such person and all state taxes have been paid on the liquor, what should I do with the whiskey after I capture the same? Should I destroy the whiskey as provided in the old prohibtion laws? If a representative of the Alcoholic Beverage Control Board of Alabama seizes whiskey in Franklin County from a person who has illegal possession of said whiskey in Franklin County and said whiskey was purchased from a state liquor store and all state taxes have been paid on same, what should said representative of the Alcoholic Beverage Control Board do with the whiskey captured in Franklin County? Please let me have your opinion."

In an opinion rendered to Hon. D. E. Dunn, Assistant Administrator, Alabama Alcoholic Beverage Control Board, Montgomery, Alabama, under date of July 29, 1937, (Quarterly Report of Attorney General, Vol. VIII, p. 41) to which we respectively invite your attention, it was held as follows:

"As to alcoholic beverages which were originally purchased in a legal manner, i. e., from a State Liquor Store or from licensed retail dealers as the case might be, and which bear the proper stamps or identification marks, but which are being illegally sold or kept for sale, it is my opinion that such beverages should be forfeited and destroyed, in either a wet or dry county, in accordance with the provisions of Article 11 of Chapter 167 of the Code of Alabama, 1923, which is the article of the old prohibition statutes providing for the forfeiture and destruction of contraband liquors and other products. As can be seen from a reading of the above quoted

sections of the Alabama Beverage Control Act, the confiscation provisions of said Act do not apply to alcoholic beverages that have been legally purchased and bear the proper stamps and/or identification marks, but which are being illegally sold or kept for sale. These sections only apply to unstamped and/or unidentified alcoholic beverages. Likewise, a vehicle used for the purpose of transporting such beverages for sale in a manner not in accordance with the provisions of the Act is subject to condemnation in accordance with the appropriate provisions of Article 11 of Chapter 167 of the Code of Alabama, supra. Therefore, if a person in a wet county who does not hold an appropriate license authorizing him to sell the same is found selling or keeping for sale such alcoholic beverages, then these beverages should be condemned and destroyed in accordance with the provisions of Article 11 of Chapter 167, Code of 1923, supra, and not in accordance with the provisions of the Alabama Beverage Control Act, since the confiscation provisions of the Alabama Beverage Control Act are not applicable to the same. The same procedure should be followed in regard to any such legally purchased alcoholic beverage sold or kept for sale in a dry county in Alabama, since the sale of all alcoholic beverages in the dry counties is prohibited. The same procedure should also be followed in regard to the condemnation of any vehicle found transporting such beverages for such purposes."

As pointed out in that opinion, which was rendered prior to the time the Alabama Beverage Control Act first received construction by the appellate courts of this State, this office had held that alcoholic beverages, including liquor, legally purchased in a wet county in Alabama could be legally possessed in a dry county in Alabama, and, consequently, the holding in the above quoted excerpt only applied "to alcoholic beverages which were originally purchased in a legal manner, i. e., from a State Liquor Store or from licensed retail dealers as the case might be and which bear the proper stamps or identification marks, but which are being illegally sold or kept for sale * * * in * * * a * * * dry county." However, the Court of Appeals in the case of **Welder Williams, v. State,** 179 So. 915, held, and the Supreme Court of Alabama approved that holding, 235 Ala. 520, 179 So. 920, that no alcoholic beverages, whether originally purchased in accordance with the provisions of the Alabama Beverage Control Act or not, could be legally possessed in a dry county in Alabama.

Since no alcoholic beverages, whether originally purchased in accordance with the provisions of the Alabama Beverage Control Act or not, may be legally possessed in a dry county in Alabama, the holding of our opinion contained in the quoted excerpt, supra, as to the procedure to be followed in condemning such beverages being illegally sold or kept for sale is equally applicable to the procedure to be followed in the case of alcoholic beverages which were originally purchased in accordance with the provisions of the Alabama Beverage Control Act, but which are being illegally possessed in a dry county.

The premises considered, your questions are answered as follows:

1. Whiskey which has been purchased from a State Liquor Store and on which the State stamps or marks of identification appear (there is no State tax on whiskey), seized by you in the dry county of Franklin should be forfeited and destroyed in accordance with the provisions of Article 11 of Chapter 167 of the Code of Alabama, 1923, which is the article of the old prohibition statutes providing for the forfeiture and destruction of contraband liquor and other products. Likewise, such whiskey, when seized by a repre-

sentative of the Alabama Alcoholic Beverage Control Board in the dry county of Franklin should be forfeited and destroyed in the same manner.

Nothing in the opinion of the court in the Williams case, supra, or in the opinions of the Court of Appeals and of the Supreme Court in the case of **Burdette Holt v. State,** still in manuscript, which is a later case involving a construction of the Alabama Beverage Control Act, militates against the conclusions hereinabove reached, but, on the contrary, those opinions are authority for these conclusions. Cf. Opinion of the Attorney General to Hon. J. D. Kirby, Sheriff, Hale County, Greensboro, Alabama, under date of July 10, 1939, a copy of which is herewith enclosed for your information.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 8, 1939.

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Licenses—Motor vehicles—Schedule 158.17 of Section 348, Chapter 6 of Article XIII of the 1935 Revenue Act, as amended by Act No. 212 (Geneval Acts, 1939) Approved August 8, 1939, construed—

1. Said act changes the license year on motor vehicle licenses from October 1-September 30 to November 15-November 14.

2. Said act extends the life of motor vehicle licenses for the license year 1938-1939 from September 30, 1939, to November 15, 1939.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of October 16, 1939, in which you request my opinion as follows:

"Please refer to House Bill No. 104, which regards to the due and delinquent date on motor vehicle license, and elucidate on same for my benefit and for the benefit of other Probate Judges who may not understand the meaning of this bill. I would like some explanation of the Bill as to the following:

"Does this bill, which sets November 15 as the due date and delinquent date of motor vehicle license, in effect, change the license year on such licenses from October 1st-September 30th to November 15th-November 14th?

"Since the due and delinquent date is November 15th, may a person operate his car with the old license until the 14th of November, set his car up and not run it from that date, without obligation to himself to purchase a new license.

"If a person operates his car until the 14th of November, sells his car to another person after the 15th of November, may the purchaser of the car purchase a tag for the next year on a monthly declining basis?

"There are several other questions which will naturally arise in connection with this law and I wish that you would explain it fully. I am wondering what the intent of the law was, any way."

The act to which you refer is Act No. 212 (General Acts, 1939) approved August 8, 1939, which said act amended Schedule 158.17 of Section 348 of Chapter 6 of Article XIII of the 1935 Revenue Act to read as follows:

"Schedule 158.17: All motor vehicles licenses under this Act shall become due on the 15th day of November of each year, and delinquent after that date; but they shall be issued on application at any time within 45 days prior to that date."

At the outset, I will state the reasons for the enactment of this act as I understand them. As you know, Schedule 158.17, supra, prior to amendment, read as follows:

"All motor vehicle licenses under this act shall become due on October 1st of each year and delinquent on November 15th thereafter."

This office in opinions to Hon. Eugene B. Henry, Commissioner of Licenses, Jefferson County, Birmingham, Alabama, under date of July 30, 1936 (Quarterly Report of Attorney General, Vol. IV, p. 100) and to Hon. W. M. Vaughan, Judge of Probate, Dallas County, Selma, Alabama, under date of November 29, 1937, (Quarterly Report of Attorney General, Vol. IX, p. 118), held, under the provisions of said schedule, and the other pertinent provisions of the 1935 Revenue Act, that when a person drove a motor vehicle on the highways of the State after October 1st of any year but failed to purchase a license therefor, and then dispose of same, that the subsequent owner when he purchased a license therefor after November 14th was subject to the automatic penalties imposed by Subsection (c) of Section 353 of the 1935 Revenue Act because the motor vehicle had been driven on the highways of the State after October 1st by the original owner, even though the subsequent owner who purchased the license had not driven it on the highways of the State since October 1st.

The holding of these opinions was questioned in the courts of the State, but the correctness of the same was upheld by the Supreme Court of Alabama in the case of **Henry, Commissioner of Licenses of Jefferson County v. Drennen Motor Car Co.**, 235 Ala. 559, 180 So. 563. It was felt by many that this condition of our Revenue laws resulted in a hardship and unnecessary burden on the dealers in, and purchasers of, secondhand or used motor vehicles in the State, and the matter was called to the attention of the 1939 session of the Legislature. In an effort to rectify this situation, the Legislature passed Act No. 212, supra, the language of which is clear and unambiguous.

The act, supra, does have the effect of changing the license year on motor vehicle licenses from October 1-September 30, which was the license year prior to its passage, to November 15-November 14. Since, under the act, the motor vehicle license is not due until November 15th, it necessarily follows that the license issued for the license year 1939-1940 will not expire until another license becomes due, which is November 15, 1940.

The act, supra, also has the effect of extending the life of motor vehicle licenses purchased for the license year 1938-1939, which under the schedule, prior to amendment, would have expired on September 30, 1939, through November 14, 1939, the day before the next motor vehicle license is due under the provisions of said schedule, as amended, supra. Consequently, a motor vehicle may be operated on the highways of this State under a 1938-1939 license through November 14, 1939, without any obligation being incurred thereby for the purchase of a new license for the license year 1940-1941.

If a person operates a motor vehicle on the highways of this State under a 1938-1939 license through November 14, 1939, but does not so operate it after that date, and after November 15, 1939, sells the same to another person, the purchaser may secure a license for said motor vehicle for the fiscal year 1939-1940 on a monthly declining basis. See Act No. 67 H. 21, approved February 9, 1937 (General Acts, 1936-37, p. 86), and opinions to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama, under date of February 19, 1938 (Quarterly Report of Attorney General, Vol. X, p. 98) and to Hon. J. S. Benson, Judge of Probate, Jackson County, Scottsboro, Alabama, under date of March 29, 1939, (Quarterly Report of Attorney General, Vol. XIV, p. 268).

Act No. 67, supra, provided in pertinent part: "Provided, however, that for new and used automobiles acquired subsequent to November 15th in any tax year these licenses shall be purchased on a monthly declining basis of one-twelfth (1/12) or for each month of the tax year and that the purchaser shall only buy a license for the then remaining months of the tax year." Now that the license year is from November 15-November 14 instead of from October 1-September 30, as formerly, the months would begin on the 15th instead of the first, and a person would not be entitled to a reduction under the quoted excerpt from Act No. 67, supra, until December 15.

Since, under the provisions of Schedule 158.17, as amended, supra, motor vehicle licenses "become due on the 15th day of November of each year, and delinquent after that date," it is very clear that such licenses now become delinquent on, but not until, November 16th, instead of on November 15th, as was the case prior to the time said Schedule was amended.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 9, 1939.

Hon. L. C. Garrison,
Judge of Probate,
Walker County,
Jasper, Alabama.

Licenses—Automobile Dealers—

Subsection (b) of Schedule 12, as amended, providing for the licensing of persons maintaining more than one place of business held limited to persons maintaining more than one place of business in the same city or town.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of October 16, 1939, in which you request my opinion as follows:

"RE: ACT 370 (H. 352) SCHEDULE No. 12 AUTO DEALER.

"Schedule No. 12, approved September 22nd, 1939, is not fully clear, when applying it to the different towns and Municipalities in Walker County.

"Subsection 'b' 'Provided a person maintaining more than one place of business for the sale of automobiles, trucks, or other self-propelled vehicles as above enumerated, shall pay an additional license of one-half of the license levied on his principal place of business for each additional place of business in excess of one; provided a licensed dealer may maintain a used car lot for the sale of used or second hand cars, without the payment of an additional license.'

"Walker County has two Auto Dealers with principal place of business at Sumiton, unincorporated town, which takes lowest rate in this Schedule, $30.00 State, $15.00 County License. When and if these dealers apply for Auto Dealer License to sell automobiles in Jasper, which takes highest rate in Walker County, viz. $65.00 State and $32.50 County License, they having already obtained License for their **principal** place of business at Sumiton, should I issue the License on the payment of $15.00 State and $7.50 County License, which would seem to agree with Subsection 'b' of the License Schedule? If this is the wrong interpretation of this Schedule what amounts should be collected for the license?

"Walker County also has dealers in Jasper, their principal place of business, who also sell automobiles in Carbon Hill. The population of Jasper is 5313, last Census, and the population of Carbon Hill 2518. After these dealers obtain License to sell automobiles in Jasper, Jasper Rate $65.00 State and $32.50 County, what amounts should be collected for the License to sell automobiles in Carbon Hill?

"I hope you may give me your opinion in the next few days covering this Schedule No. 12. Application was made for License under this Schedule and I have asked the dealer to wait for your opinion."

In my opinion, Subsection (b) of Schedule 12, as amended, should be construed so as to read into said subsection the words "in the same city or town" so that such subsection would read:

> "Provided, a person maintaining more than one place of business in the same city or town for the sale of automobiles, trucks or other self-propelled vehicles as above enumerated shall pay an additional license, etc."

In **City of Birmingham v. Southern Express Co.,** 164 Ala. 529, 51 So. 159, the court very clearly stated the rule that the legislative intent must be sought in construing a statute and that such intent is the law. See also **Sunflower Lumber Co. v. Turner Supply Co.,** 158 Ala. 191, 48 So. 510; **Davis v. Thomas,** 154, Ala. 279, 45 So. 897.

In order to ascertain the legislative intent, it is necessary to carefully consider the possible constructions which may be placed on Subsection (b) of Schedule 12, as amended. This subsection is capable of three constructions.

Let us assume that John Doe operates as an automobile dealer maintaining his principal place of business in a town of over fifty thousand inhabitants, which he will call town A, for which the license is $140.00 and also maintains another place of business for the sale of automobiles, etc., in a town of twenty-five hundred inhabitants, or less, which we will call town B, for which a license of $30.00 is required.

Under Subsection (b), as amended, the following interpretations might be placed thereon:

1. Adopting a literal interpretation of the words "shall pay an additional license of one-half of the license levied on his principal place of business," John Doe would be required to pay $140.00 on his place of business in the town A and $70.00, which would be one-half of the license levied on his principal place of business, in town B. The difficulty in concluding that this was the legislative intent is that by doing so we convict the Legislature of enacting a statute which would permit of easy evasion and ready subterfuge. It will at once be seen that if John Doe desired to do business in more than one town, it would be a simple matter for him to set up his principal place of business in a town requiring the minimum license and operate from such town throughout the State. In such event, John Doe could establish his principal place of business in a town of twenty-five hundred inhabitants, or less, for which the license is $30.00 and operate in the larger towns for one-half of that license, or $15.00. It has been repeatedly held that laws should be given sensible construction and general terms should be limited so as not to lead to absurd consequences. 25 R. C. L. 959; **Ex parte Rowe,** 4 Ala. 254, 59 So. 69; **State v. Birmingham Water Works Co.,** 185 Ala. 388, 64 So. 23. Also see 59 C. J. 970, Sec. 574, Notes 81, 86. It has further been held that where a literal construction of a statute would lay the statute open to easy evasion and nullification, such fact is a legitimate circumstance to be considered in ascertaining the meaning where construction is necessary. **Pittsburgh Life & Trust Co. v. Young,** 90 S. E. 568, 572 (N. C.). These premises being true, it therefore becomes necessary to consider other possible interpretations of the statute to determine the legislative intent.

2. The second possible interpretation is based upon the assumption that by the use of the words "shall pay an additional license of one-half of the

license levied on his principal place of business" the Legislature intended to require the operator of a second place of business to procure a license for such second place of business measured by one-half the amount he would be required to pay in such town had such second place been a principal place of business. In other words, under the hypothetical facts stated, supra, adopting this line of reasoning, John Doe would pay $140.00 in town A and $15.00 in town B. This construction also has the same objectionable features as those hereinbefore set out.

The language of a statute must be read in a sense which harmonizes with the subject matter and the general purpose and object of the statute. **25 R. C. L. 1013, Section 253.** The general design and purpose of this law is obviously to raise revenue and considering the effect of such a construction in the light of this object at once reveals the fallacy of attributing any such intention to the Legislature.

3. The third possible construction is that which we have stated at the outset, i. e., to read into Subsection (b), as amended, an intention on the part of the Legislature to make such subsection applicable only to a person maintaining more than one place of business in the same city or town. In other words, again resorting to our hypothetical statement of facts, if John Doe operated his principal place of business in town A and also maintained a second place of business in Town A, he would be required to pay $140.00 on the first place and $70.00 on the second. If, on the other hand, he operated his principal place of business in town A and a second place of business in town B he would be required to pay $140.00 on the first place and $30.00 on the second. This interpretation becomes clearer when attention is called to the last proviso of Subsection (b) which is as follows:

> "Provided, a licensed dealer may maintain a used car lot for the sale of used or second-hand cars without the payment of an additional license."

The generally understood practice of automobile dealers is that, in addition to maintaining the regular place of business at which new cars are sold, such dealers frequently maintain in the same town so-called "used car lots" for the sale of used or second-hand cars. It was evidently the realization of this fact that caused the Legislature to exempt used car lots from the payment of such license, it being determined by the Legislature that the used car lot would be a part of the same business rather than an additional place of business in the same town. However, it is not to be doubted that if a licensed dealer in town A maintained a used car lot in town B that such used car lot would be an additional place of business and would be subject to the license prescribed.

Considering the premises, therefore, that the constructions mentioned in paragraphs one and two above, would lead to an absurdity on the one hand and on the other would open the door to evasions and nullification of the statute. I, therefore, advise you that the schedule, as amended, should be administered as follows:

1. A person who has two places of business in a town or city should be required to pay the schedule rate on the first place of business and one-half of the amount on the second place of business.

2. A person owning a place of business in town A (again we revert to our illustration) and a second place of business in town B must pay the town A rate on the first place of business and the town B on the second place of business, rather than one-half of town A rate on the second place of business.

3. Likewise, if a person has his principal place of business in town B and a branch in town A, he should be required to pay the town B rate on the town B establishment and the town A rate on the town A establishment.

The requirement that license be procured by the dealer for each "additional place of business in excess of one" does not alter the forgoing conclusions. Although this portion of the statute is very unartfully drawn, it is my judgment that the only reasonable conclusion which can be reached is that the Legislature intended to place the additional one-half license on each additional place of business and the words "in excess of one" must be treated as surplusage. This is the only sensible construction—any other would without doubt be absurd.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 9, 1939.

Hon. J. Bruce Henderson,
Senator, 22nd District,
Millers Ferry, Alabama.

Counties—Legislature—Expense of advertising local bills, which are of interest to the county and the people as a whole, and not private or individual bills, shall be paid by the county, if same become laws, and may be paid by the county if they do not become laws.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of October 31, 1939, in which you request my opinion as follows:

"In case a County Board of Revenue agrees with their Senator and Representative to pay for the advertising of a local bill before that bill is advertised and the legislators and the printer go ahead and advertise that bill with the understanding that it will be paid, and that bill does not become a law and the printer renders a bill to the Board of Revenue for that advertising, can the Board of Revenue pay that bill out of the general funds of the county, out of the road and bridge funds of the county, out of the gas tax funds, or out of any other funds of the county?"

In answer to your inquiry, I am of the opinion that the county may pay for the advertising of the notice of the local bills in question out of its general fund, provided said bills were of interest to the people of the county as a whole, and were not private or individual bills.

Your inquiry involves a construction of the following provisions of law: Section 6755(14) of the Code of Alabama, 1923 (as amended in 1927 but which amendment is not here material); Act 275, H. B. 385, approved June 18, 1931 (General Acts, 1931, p. 325); Act 622, H. B. 1100, approved July 31, 1931 (General Acts, 1931, p. 759).

Section 6755(14) of the Code of 1923 provides as follows:

"Section 6755. Authority of the court. The court has authority ***

"14. To pay, at the regular legal rate, for the advertising of notice and substance of local bills, which may be introduced in the legislature for the benefit of their respective counties, or in reference to subjects or matters exclusively relating to county business or affairs. *** "

Act No. 275, supra, provided, in pertinent part, as follows:

"Section 1. That the expense heretofore or hereafter incurred in the publication of the intention to introduce a local bill in the Alabama Legislature shall be paid, by the county affected thereby, out of the general funds of said county; provided that in counties having two judicial divisions, in each of which regular terms of circuit court are held, such publication may be made in both of such divisions at the expense of the county. 'Provided that such Bills are introduced, passed and become law.' "

Act No. 622 was an amendment to Section 6755 of the Code of 1923 (as amended in 1927), in which Subsection 14 was incorporated in the identical language as in the original 1923 Code Section. Part of Section 6755 was again amended in 1933, but this amendment is immaterial to our purposes as is the 1927 amendment.

In a former opinion of this office rendered to the Judge of Probate of Elmore County on October 28, 1931 (Biennial Report of Attorney General, 1930-32, page 530) it was held that Act No. 275 constituted a limitation on, and substantial revision of, Section 6755(14) of the Code of 1923, and that the expense of advertising is not a charge against the county unless the bill is introduced, is passed, and becomes a law. This opinion was followed by two later opinions found in Biennial Report of Attorney General 1932-34, page 207, and Biennial Report of Attorney General 1934-36, page 313, respectively. However, the opinion to the Judge of Probate of Elmore County of October 28, 1931, supra, failed to take into consideration Act No. 622, approved July 31, 1931, supra, amending Section 6755 of the Code of 1923, which incorporated Subsection 14 as it appeared in Section 6755 originally. Therefore, this opinion and the ones that cite it with approval, wherein it is held that the county can pay for advertising only when the bill is introduced, is passed and becomes a law, are erroneous and each is hereby overruled and withdrawn in this respect.

In my judgment, a proper construction of the statutes under consideration requires that they be construed in pari materia. It is a fundamental rule of statutory construction that statutes relating to the same subject should be construed in pari materia and each given a field of operation, if possible; and this is particularly true of statutes adopted at the same session of the Legislature. (See Alabama So. Dig., Statutes, Key Nos. 225 and 225¼).

Section 6755(14) of the Code of 1923, supra, authorized counties to pay for advertising of notice and substance of local bills, which may be introduced in the Legislature for the benefit of their respective counties, or in reference to subjects or matters exclusively relating to county business or affairs. This section was merely an authorization and was not mandatory. However, it was not necessary that the bill advertised become a law.

Act No. 275, supra, provided that the county **shall** pay for advertising of local bills upon the condition that the said bills become laws. However, even under this act, the law must be of interest to the county and the people as a whole, and not merely a private or individual bill. (See Biennial Report of Attorney General 1932-34, page 313, supra).

Applying the above rule of statutory construction, it is my opinion that each of the two statutes has a field of operation and that they should be construed in pari materia. One allows the county to pay for advertising of local bills whether same become laws or not. The other makes it mandatory that the county pay for the advertising of those bills that become laws. However, in both instances the bills must be to the interest of the county and the people as a whole and not private or individual bills. This interpretation, in my judgment, effectuates the legislative intent, which conclusion is strengthened by the fact that Act No. 622, (passed in the same session, but six weeks later, in which Act No. 275, supra, was passed) amending Section 6755 of the Code of 1923, incorporated Subsection 14 in the identical language as it appeared originally in Section 6755.

The payments by the county are payable from the general fund. See **Weaver v. Tidwell,** 228 Ala. 169, 153 So. 218.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 9, 1939.

Hon. J. M. Schnell, Chairman,
Mobile County Board of Registrars,
Court House,
Mobile, Alabama.

Registrars—Registration of electors—

1. Person convicted of violation of any State or Federal prohibition law which is punishable by imprisonment in the penitentiary disqualified to register as an elector.

2. Felony under both State and Federal laws defined.

3. Witness testifying in behalf of applicant for registration not required by law to be a qualified elector.

4. There is no authority of law for Board of Registrars being furnished with stationery, stamps or stenographic service.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of October 16, 1939, in which you request my opinion as follows:

"Would you be kind enough to give us your opinion in the following instances.

"1. Under what circumstances is one, convicted of violating the State or Federal Prohibition Laws prohibited by the constitution from becoming a qualified elector, all other requirements having been met. In other words under what circumstances is the conviction of violating the State or Federal Prohibition Laws a felony?

"2. The form furnished by the Secretary of State of Alabama, for the use in the registration of qualified electors, by the Board of Registrars, Mobile County, specifies that a witness for an applicant for registration before it qualifies himself under oath that he or she is a qualified elector in blank ward, or blank precinct in blank county. Do you interpret this, that one who presents him or herself as such a witness must be a qualified elector in Mobile County; or any other County in Alabama; or from any other state, or is he or she, under the Constitution, prohibited from becoming such a witness unless he or she is a qualified elector of Alabama, or is this qualification merely a check on his or her whereabouts?

"3. Do you know of any provision being made, either in the Constitution or Code, whereby the Mobile County Board of Registrars could be furnished with such necessities in the legal operation of its office, as stationery, stamps, and stenographic service."

Your questions will be considered seriatim.

In answering your first question, I direct your attention to Section 182 of the Constitution of Alabama, 1901, which reads as follows:

"Section 182. The following persons shall be disqualified both from registering, and from voting namely:

"All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this constitution; those who shall be convicted of treason, murder,

arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property, or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, **or any crime punishable by imprisonment in the penitentiary,** or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offerin to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector." (Emphasis supplied)

Section 364 of the Code of Alabama, 1923, provides:

"Section 364. Disqualifications of elector to vote.—The following persons shall be disqualified both from registering and voting: All idiots and insane persons; those who were by reason of conviction of crime disqualified from voting at the time of the ratification of the constitution on November 28, 1901; those who have been since November 28, 1901, or who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, **or any crime punishable by imprisonment in the penitentiary** or of any infamous crime or crimes involving moral turpitude; also any person who has been since November 29, 1901, or who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote, or the vote of another; or of buying or offering to buy the vote of another, or of making or offering to make false return in any election by the people, or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector." (Emphasis supplied)

It may be seen from the above quoted constitutional and statutory provisions that a person who has been convicted of a crime "punishable by imprisonment in the penitentiary" is disqualified from registering or voting in this State. The premises considered, you are advised that when a person is convicted of the violation of a provision of either the State or Federal prohibition laws "punishable by imprisonment in the penitentiary," such person is disqualified from registering as an elector in this State.

You next ask under what circumstances is the conviction of violating a State or Federal prohibition law a felony. A felony in the State of Alabama is defined by Section 3874 of the Code of Alabama, 1923, which reads:

"Section 3874. Felonies and misdemeanors defined.—A felony within the meaning of this Code, is a public offense which may be punished by death, or by imprisonment in the penitentiary; all other public offenses are called misdemeanors."

A felony under the Federal law is defined by Section 541 of Title 18, U. S. C. A., as follows:

"Felonies and misdemeanors.—All offenses which may be punished by death or imprisonment for a term not exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors."

Therefore, whether a person who has been convicted of violating a particular provision of the State or Federal prohibition laws has been convicted of a felony, depends upon the punishment prescribed by statute for a violation of that particular provision. When you desire to know whether or not a person who has been convicted of violating the State or Federal prohibition laws has been convicted of a felony, you must first ascertain the particular provision of the State or Federal prohibition laws for a violation of which he has been convicted, and then determine the punishment prescribed by statute for a violation of that particular provision. Then by applying the statutory provisions hereinabove quoted, you may determine whether or not he has been convicted of a felony.

The Secretary of State has furnished me blank forms of the "oath of applicant for registration," "examination of supporting witness," and "certificate of registration" which the Secretary of State prepares and furnishes to the various Boards of Registrars pursuant to the provisions of Article III of Chapter 19, Sections 370-404, Code of Alabama, 1923, and particularly Sections 378, 380 and 386. Certain sections of this article have been amended, but they are not material to your inquiry. The constitutional and statutory provisions of this State in regard to the registration of voters have been carefully examined, and I find no requirement that a person testifying as a witness in behalf of an applicant for registration must be a qualified elector. Your attention is directed to Sections 380 and 382, Code of Alabama, 1923, which read, respectively, as follows:

"Section 380. Examination and oath of applicants to register.—The board of registrars shall have power to examine, under oath or affirmation, all applicants for registration, and to take testimony touching the qualifications of such applicants. Each member of such board is authorized to administer the oath, to be taken by the applicants and witnesses, which shall be in the following form and subscribed by the person making it, and preserved by the board, namely: 'I solemnly swear (or affirm) that in the matter of the application of ..... for the registration as elector, I will speak the truth, the whole truth, and nothing but the truth, so help me God."

"Section 382. Applicants may be refused.—Any person making application to the board of registrars for registration who fails to establish by evidence to the reasonable satisfaction of the board of registrars that he or she is qualified to register, may be refused registration."

In my opinion, the questions of whether or not the testimony of a witness or witnesses in behalf of an applicant for registration will be required, or whether or not the witnesses giving such testimony, if it is required, are qualified electors are matters which address themselves to the Board of Registrars pursuant to the power vested in it by the code sections last hereinabove quoted. However, if the Board does require testimony of a witness or witnesses in support of a person's application for registration, the witness or witnesses must be required to take the oath prescribed by Section 380, supra.

In regard to your inquiry as to whether or not there is any provision of law whereby a Board of Registrars may be furnished with stationery, stamps, and stenographic service for use in the performance of its official duties, you are advised that I know of no such statutory authority. Of course, Sections 386 and 397 of the Code of Alabama, 1923, provide for the Secretary of State furnishing, at the expense of the State, certain registration books, blank forms of oath, certificates of registration, and notices, to the Boards of Registrars, but this does not include stationery, stamps or stenographic service.

In thus answering your last inquiry I have not considered any local act which might affect this subject in Mobile County, as, since you have not directed my attention to any such local act, I presume that there is none.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 9, 1939.

Hon. T. C. Garner,
Treasurer, Jefferson County,
Birmingham, Alabama.

Counties—Have no authority to pay a veterinarian for services for treating blood hounds which are used by the sheriff, but do not belong to the County.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion dated October 18, 1939, which reads as follows:

"The County Commission of Jefferson County has passed a resolution approving the payment of a charge by a veterinarian for treating blood hounds which are used by the Sheriff of Jefferson County. It is my understanding that these blood hounds are not the property of Jefferson County, but that the Sheriff has charge of them and uses them in connection with his official duties.

"I would appreciate your opinion as to whether or not the governing body of Jefferson County has the authority to authorize this payment."

In my opinion your question should be answered in the negative. This office has heretofore held that a county has no authority to use county funds for the purchase of blood hounds for the sheriff. Biennial Report of Attorney General, 1928-30, page 375.

There is no provision of law, either expressed or implied, in the general laws of this State, which authorizes such an expenditure by the county, and my attention has not been called to any local act or general act with local application on the subject.

The policy long adopted in this State is that a county can incur no liability, make no contracts, nor do any act, regardless of the benefits that might be derived thereby, unless the power to do so is derived either from an express authorization of the law or by necessary implication. It has no powers except those which are necessary to the performance of the governmental functions imposed on it.—**Mobile v. Drago,** 172 Ala. 155, 54 So. 995; **Naftel v. Montgomery County,** 127 Ala. 562, 29 So. 29; **Jack v. Moore,** 66 Ala. 184; Quarterly Report of Attorney General, Vol. IX, page 35; Quarterly Report of Attorney General, Vol. XI, page 146.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 9, 1939.

Hon. B. G. Robison,
Judge of Probate,
Pickens County,
Carrollton, Alabama.

Counties—Gasoline Tax Warrants—(Acts 1935, p. 441, Section 348) Schedules 156.9, 156.11)

1. County may pledge not exceeding one-third part of its share of State-levied gasoline tax, to secure warrants issued and sold to settle outstanding valid warrants for road work.

2. County may pledge said fund with a trustee, other than County Depositary, and authorize trustee, without intervention of County Treasurer or Depositary, to endorse vouchers and checks representing such part of said funds and apply the proceeds to payment of said warrants and interest thereon.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion dated October 18, 1939, which reads as follows:

"The Court of County Commissioners of Pickens County has recently authorized the issuance of the State Gasoline Tax Revenue warrants of Pickens County in the amount of $75,000.00. These warrants

are to be retired solely out of the gasoline tax funds received from the State of Alabama.

"In the resolution authorizing the issuance of such warrants is a provision requiring a special fund into which shall be covered that part of such gasoline tax receipts as is to be devoted to the retirement of the warrants. It is also provided in said resolution that the aforenamed special fund shall be placed with the First National Bank of Mobile as trustee.

"It is further provided that the Court of County Commissioners authorize the First National Bank of Mobile to endorse all vouchers and checks forwarded to that bank by the State Comptroller and to apply the proceeds thereof toward payment of the principal and interest on said warrants."

"I request your opinion as follows:

"1. Whether or not the Court of County Commissioners of Pickens County can legally authorize the funds heretofore described to be placed in the First National Bank of Mobile, Alabama, when the Bank of Gordo, in Pickens County, is the regularly designated county depository of Pickens County.

"2. If such designation is legal, is it necessary to require security from the First National Bank of Mobile?

"3. Can the Court of County Commissioners of Pickens County legally authorize the First National Bank of Mobile to endorse all such vouchers and checks for Pickens County and to apply the proceeds thereof toward payment of the principal and interest on said warrants?"

This opinion is based on the assumption that the funds in question were pledged in accordance with the decision in **Herbert v. Perry et al.**, 235 Ala. 71 (177 So. 561), which held that counties may pledge not exceeding one-third of their share of the State levied gasoline excise tax (General Revenue Act of 1935) to secure warrants issued and sold for payment of existing county debt incurred for road work and represented by valid outstanding county warrants.

Quarterly Report Attorney General, Vol. XIV, p. 89 (1939).

From the resolution and order of the governing body submitted for examination it appears that the county proposes to settle, refund or pay an outstanding, valid indebtedness of $75,375 heretofore incurred for road work, by issue and sale of $75,000 "State Gasoline Tax Revenue Warrants," payable solely out of the county's share of the State gasoline excise tax, stated as in excess of $99,000 for the fiscal year 1937-38, amounting to $104,936.42 for the year ending September 30, 1939, and anticipated to be not less than the latter amount for each succeeding year to and including 1943.

Code 1923, Section 1347 (Section 1397(110) of Michie's Code of 1928) empowers county governing bodies to "make and enter into such contracts as

may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges, and ferries in their respective counties," and to that end they are clothed with legislative, judicial and executive powers and are declared to be "courts of unlimited jurisdiction and powers." Act No. 347, H. 391, approved Aug. 23, 1927, (Acts 1927, pp. 348, 391, S. 157).

Section 6782 of the Code of 1923 empowers such boards to "settle, adjust or refund" outstanding indebtedness evidenced by valid warrants, by issue of warrants in amount not greater than the amount of warrants so to be settled, adjusted or refunded.

An Act of the Legislature (Acts, Extra Session, 1936, p. 28—No. 61, approved March 26, 1936) authorizes a county governing board "to **expend** not to exceed one-third of the total amount that may be received from the gasoline excise tax in the payment of any debt that may have been **heretofore** incurred by such county for the construction and/or maintenance of roads and bridges." (Emphasis supplied)

The act has been construed by this office to authorize issue of interest bearing warrants to pay such debts incurred **after** approval of the act, and prior to adoption of a resolution authorizing the warrants, to obtain funds to be used in the construction and maintenance of county roads and bridges, and to pay valid outstanding claims for such construction and maintenance.

Quarterly Report, Attorney General, Vol. XIV, pp. 89-92;

Citing **Herbert v. Perry,** supra.

1. I am of the opinion, therefore, in response to your question numbered 1, Whether or not the Court of County Commissioners of Pickens County can legally authorize the funds from the gasoline tax to be placed in the First National Bank of Mobile, Alabama, when the Bank of Gordo in Pickens County is the regularly designated County Depositary of Pickens County, that said court is authorized to make such deposit.

2. In response to your question numbered 2, If such designation is legal, is it necessary to require security from the First National Bank of Mobile? I find no statute or provision of law requiring such security to be given. The bank is not a depositary within the meaning of the statute requiring security for county funds. It is a trustee merely, designated to effect the pledge, a fiscal agent to receive and apply a special fund, sale of which may be effected by issue of so-called warrants, which the court says "are not warrants of the county in the true sense, but are merely evidences of transfer and pledge of a definite fund to their payment." **Isbell v. Shelby County,** 235 Ala. 571, 180 So. 567; **Burleson v. Court of County Commissioners,** 235 Ala. 576, 180 So. 572.

3. Answering your inquiry numbered 3: "Can the Court of County Commissioners of Pickens County legally authorize the First National Bank of Mobile to endorse all such vouchers and checks for Pickens County and to apply the proceeds thereof toward payment of the principal and interest on said warrants," I am of opinion that said court is so authorized, upon the theory of the Isbell case.

In **Ellis v. Batson,** 177 Ala. 313 (58 So. 193), it was held that a contract between a County Treasurer and another whereby the former undertook to authorize the latter to receive and disburse county funds was contrary to public policy and so tainted with illegality as to afford no basis for recovery of funds embezzled by the latter in an action of assumpsit or for money had and received. **Quarterly Report of Attorney General,** Vol. XIV, p. 45 (1939).

It is the duty of the County Treasurer to "number, register and pay all claims allowed against a fund raised for a special purpose"—Code 1928, Section 303(4).

It is his duty also "to keep a correct account of the receipts and disbursements of all money received by him for the County, according to the forms herein prescribed, (i. e. by statute), charging himself with all moneys so received, of whom, on what account, and the amount, and crediting himself with all payments, stating the number and character of the claims, in whose favor, and the amount."—Code 1928, Section 303(9).

The Bank of Gordo is, we take it, County Depositary under the provisions of Section 312 of the Code of 1923 (Acts 1915, page 348, Sec. 1), and as such is charged with all the duties and subject to all the liabilities attaching to **the** office of County Treasurer.

In the Ellis-Batson case, it may be said, the attempted delegation of the Treasurer's duty related to **all** county funds received, collected and disbursed. On page 316 of the opinion it is said:

> "Whether or not the statute would prevent a special deposit of the fund, as distinguished from a general deposit, or special bailment, such as sending funds by express, we need not decide, as it is evident that the arrangement, as set up in the complaint, is more than a mere special deposit for safe-keeping or transmision of the fund; it shows an unauthorized delegation of the duty of the plaintiff to Batson of receiving, keeping, and accounting for the funds covering a series of years and is in violation of the statute."

The foregoing authorities, however, are without application to the situation before us, on account of the latest decision of the Supreme Court in the Isbell case to the effect above quoted, that such warrants "are not warrants of the county in the true sense" etc., and that under such a contract as that before us, evidenced by the resolution and order of the governing board of Pickens County, "further auditing by the county would not be essential." **Isbell v. Shelby County, et al.,** supra, decided April 16, 1938, at pages 573-4(2 and 3).

Nor am I unaware of the provision of the statute itself (Acts 1935, page 441, Section 348, Schedules 156.9 and 156.111, pages 511, 514) requiring that these county gasoline funds "when received by the County Treasurer shall be covered into the county road and bridge fund, and shall be expended exclusively in the construction, maintenance and repair of the public roads and bridges in such county," (p. 511, Schedule 156.9); and the provision (p. 514, Schedule 156.11) for "payment to be made to the County Treasurer or Depositary of said counties *** and said funds shall be used by the several counties of the State exclusively for the construction, maintenance, supervision and policing of the public roads and bridges in the respective coun-

ties", with provision for payment to the Highway Department of such part of the latter fund as may be agreed upon, under certain conditions.

The statute with such requirements was squarely before the court in the Isbell case, and was specifically referred to therein. It may be said therefore that the court has construed the statute in holding that "these instruments are not warrants of the county in the true sense, but are merely evidences of transfer and pledge of a definite fund to their payment."

"Their issuance amounts in effect to a sale by the county of the anticipated revenue to be derived from the gasoline tax allocated by the State to the county for these purposes." (p. 574, par. 4) "And under such a contract further auditing by the county would not be essential." (p. 574, par. 3).

In the matter now under consideration, the governing body of the County of Pickens is authorized, **pro tanto**, so to speak, by means of the resolution authorizing issue and sale of the gasoline fund warrants so far as may be necessary to pay principal and interest thereon, to modify or abrogate for a period of four years the statutory duty and liability of the Bank of Gordo as County Depositary to receive, disburse and account for such part of the gasoline tax fund, as it may become payable to the county in monthly installments.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

November 9, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Costs and Fees—Fine and Forfeiture Funds—Witness Fees—

The Fine and Forfeiture Funds of the various counties are of statutory creation, and the Legislature may by local legislation change or alter the method and time of payment of witness' fees out of said fund

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated October 30, 1939, which reads as follows:

"Please refer to page 56 of the Local Acts (H. B. 305—Owen, Etowah), in which Section No. 1 says 'All claims against the Fine and Forfeiture

Fund of Etowah County, both of the old and new series, heretofore issued and unpaid shall within six months after the passage and approval of this Act be presented to the Board of Revenue of Etowah County, and by said Board registered in a book kept for that purpose and claims not registered within that time shall be barred and the payment thereof prohibited.'

"The State has been holding five Witness Certificates (new series) since 1932, in the total amount of $47.70, which were registered in December 1933.

"Please give me your opinion as to the status of these claims, after considering the above Section."

I am of the opinion that the five witness certificates referred to in your request are barred, and the payment thereof is prohibited by the terms of Act No. 104, H. B. 305, approved February 15, 1937, (General Acts, Extra Session, 1936-37, page 56).

Section 1 of said Act reads as follows:

"Section 1. All claims against the Fine and Forfeiture Fund of Etowah County, both of the old and new series, heretofore issued and unpaid shall within six months after the passage and approval of this Act be presented to the Board of Revenue of Etowah County, and by said Board registered in a book kept for that purpose and claims not registered within that time shall be barred and the payment thereof prohibited."

It will be noted from the above that the six months' limitation for registering claims applies to "all claims against the Fine and Forfeiture Fund of Etowah County, both the old and the new series, heretofore issued and unpaid.'

The five witness certificates referred to in your request show that one of said certificates, namely, certificate No. 715, has never been registered with the Board of Revenue of Etowah County, and the other four certificates show that they were registered as of December 8, 1933. These certificates do not show any subsequent registration with the County Board.

The fact that the four certificates last above referred to were registered would not in my opinion create in the holder thereof any vested right against the Fine and Forfeiture Fund of Etowah County, as they are mere claims against said fund. The Fine and Forfeiture Funds of various counties are of statutory creation, and the right of witnesses to collect their attendance fees therefrom is conferred by statute. Sections 3763, 3769 and 4039 of the Code of Alabama, 1923, as amended. It is the general rule that privileges given by statute are not by nature vested rights, and such rights may be taken away or limited by the law-making body. **First National Bank of Scottsboro v. Jackson County,** 227 Ala. 448, 150 So. 690; 59 Corpus Juris 1188. Cf. Quarterly Report of Attorney General, Vol. XV, pp. 101 and 226.

The Code sections referred to above, creating the Fine and Forfeiture Funds of the various counties and conferring the right of witnesses to col

lect fees therefrom, are mere matters of grace and confer mere privileges,—they do not create rights. The Legislature has full power to take away rights, not vested, which have been conferred by statute. It is a well settled rule that the power to withdraw is commensurate with the power to confer, and when the privilege is withdrawn the person entitled to the privilege is remitted to the condition in which he stood when the privilege was conferred. **Cronheim v. Loveman,** 225 Ala. 199, 142 So. 550; **Aycock v. Johnson,** 119 Ala. 405, 24 So. 543; **Lake v. Calhoun County,** 56 Ala. 415; **Blake v. State,** 178 Ala. 407, 59 So. 623.

Therefore, since these certificates create no vested right against the Fine and Forfeiture Fund of Etowah County, and have not been registered within six months after the passage and approval of Act No. 104, supra, as provided therein, I am of the opinion that the payment of these certificates are now barred.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 9, 1939.

Hon. J. M. Wilson, Clerk,
Circuit Court, Tallapoosa County,
Dadeville, Alabama.

Witness Mileage—

1. Witnesses can only be paid mileage within the State boundaries.

2. Witnesses may be paid mileage for more than 100 miles within the State.

Opinion by Assistant Attorney General Osburn.

Dear Sir:

I have your letter of October 20, 1939, in which you request my opinion as follows:

"I have before me a witness scrip which I issued on July 2, 1938, to a state witness who had traveled 902 miles to Circuit Court in this County. This witness lived in the State of Florida at this time and was a material witness in a murder case here in this county. This scrip has been presented to the County Treasurer for payment, as the defendant was discharged, but there is a doubt in my mind as to the authority I had to issue witness scrip.

"Was I in error in issuing this scrip for the 902 miles traveled? Which would have been correct: (a) issuing a certificate for the 902 miles traveled plus a day's attendance in court, or (b) issuing a certificate only to the state line plus a day's attendance in court?"

Section 3762 of the Code of Alabama of 1923 reads as follows:

"Witnesses in criminal cases are entitled to $1.00 per day and 5c for each mile to and from their residence by the route usually traveled and all necessary ferriages and tolls."

Act No. 105, S. 141, approved October 19, 1932, (General Acts of Extra Session of 1932, page 102) has amended this Code section to reduce the per diem of the witness from $1.00 to 75c a day.

There are no restrictions set out in the Code section cited above, but the courts of our State have limited its operation to within the boundaries of this State. In the case of **Friddle v. Braun, et al.,** 7 Ala. App. 429, 61 So. 57, the court stated:

"The provisions of this statute, however, must necessarily have reference only to processes and distances within the limitation of the borders of the State, the territorial boundary line of authoritative legislative enactment."

This office has followed the rule set out in the above case in numerous opinions. In the opinion to the Treasurer of Coffee County, Elba, Alabama, found at page 763, Biennial Report of Attorney General 1928-30, it was held:

"Witnesses are entitled to mileage for traveling to and from court anywhere in the State of Alabama," and also, "Witnesses are allowed mileage from the State line only."

In an opinion to Hon. Minus H. Johnson, Clerk of the Circuit Court, Walker County, Jasper, Alabama, found at page 107, Quarterly Report of Attorney General, Vol. VI, it was held:

"A witness appearing in a criminal case, who resides out of the State of Alabama, can only be paid mileage from the State line."

Both of these opinions cite other opinions of this office reaching the same conclusion.

Your question (a) I presume to be the 902 miles traveled coming from Florida to the Circuit Court of Tallapoosa County. This being true, I answer this question in the negative. However, permit me here to point out that witnesses are entitled to their mileage so long as they remain within the State regardless of whether the mileage shall amount to more than 100 miles or not, as was held in the case of **Elliott v. Howison,** 158 Ala. 71, 48 So. 508.

Your question (b) I answer in the affirmative. From the decisions of the courts of this State and the opinions of this office, it is clearly the law

that witnesses can be paid mileage only to the State line, plus a day's attendance in court.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 9, 1939.

Hon. Fred H. Price, Clerk,
Circuit Court, Autauga County,
Prattville, Alabama.

Costs and Fees—Circuit Clerks—Appeals—

Fees for preparing of transcripts in criminal appeal cases payable as follows:

(1) From the Fine and Forfeiture Fund in all cases where the judgment of the trial court is reversed and a new trial allowed or the defendant ordered discharged.

(2) From the Department of Corrections and Institutions in felony cases, under the provisions of Section 3667, Code of Alabama, 1923, which may be supplemented in certain cases out of the Fine and Forfeiture Fund, as provided in Section 4039, as amended, where an execution has been returned "no property found" against the defendant.

(3) From the Fine and Forfeiture Fund in misdemeanor cases or cases where punishment is fixed at other than imprisonment in the State penitentiary, provided the defendant be first proved insolvent by the return of the execution "no property found."

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of September 14, 1939, in which you request my opinion as follows:

"Please advise me who is responsible for costs of preparing transcripts on Appeals to the Alabama Supreme Court and the Court of Appeals of Alabama in State cases."

An addendum to your request is as follows:

"The case referred to is The State VS Isaac Cox charged with Assault to Ravish.

"Defendant entered his plea of guilty and was sentenced to two and one half (2½) years to four (4) years on said plea and said defendant then appealed to the Court of Appeals of Alabama, which Court affirmed the cause. The said defendant was sentenced to the penitentiary under said judgment of the Circuit Court."

This office, in an opinion rendered on October 18, 1935, to the Clerk of the Circuit Court of Fayette County (Quarterly Report of Attorney General, Vol. I, page 99) has written to the question as to the particular statutes of this State which authorize a clerk to collect fees for the preparation of appeals to the Supreme Court in criminal cases.

In that opinion it was held that Section 3739, Code of Alabama, 1923, as amended by Act No. 280, H. B. 673, approved June 18, 1931, General Acts, 1931, page 331, and Sections 6102 and 6106 of the Code of Alabama, 1923, should be construed together.

The source from which a clerk collects fees for preparing transcripts in appeal cases depends on the type of case as well as the disposition thereof.

It is my opinion that in all cases where the judgment of the trial court is reversed and a new trial allowed, or the defendant ordered discharged, the clerk is entitled to collect his fee for the preparation of the transcript for appeal from the Fine and Forfeiture Fund of the county, as provided by Section 4039, Code of Alabama, 1923, as amended, and it is, of course, not necessary for an execution to issue against the defendant and to be returned "no property found" before the Fine and Forfeiture Fund becomes liable in such cases. Section 4039, as amended, is as follows:

"Section 4039. Surplus of fund to pay officers.—Whenever there shall be a surplus of the fund arising from the fines and forfeitures in the county treasury of any county, over and above the sum required to pay the registered claims of the state witnesses, the county Treasurer of such county must pay the fees of the officers of the court arising from criminal cases in which the defendant is not convicted and the costs are not imposed on the prosecutor, or in which defendants have been convicted, and have been proved insolvent by the return of executions 'no property found,' or in cases in which the state enters a nolle prosequi, or where the indictment has been withdrawn and filed, or the prosecution abated by the death of the defendant, unless the payment or distribution of such funds are otherwise provided for. **This section shall be held to apply to all fees of officers of the trial court arising on an appeal by the defendant to the supreme court or the court of appeals, in cases where the judgment of the trial court is reversed and a new trial allowed, or the defendant ordered discharged. It shall also apply in appealed cases, where the defendant has appealed from conviction and sentence to the state penitentiary, and the conviction is affirmed, to such part of the fees of the officers of the trial court, arising on the appeal, as are not paid from the convict fund under sections 3667 and 3668 of the Code, an execution for such unpaid part of such fees having first been issued against the defendant and returned 'no property found.' It shall further apply to the fees of the officers of the trial court, arising on an appeal, in cases where the defendant has appealed from a conviction, the punishment fixed being otherwise than imprisonment in the state penitentiary, and the judgment of the trial court is affirmed, provided**

the defendant be first proved insolvent by the return of the execution 'no property found.'" (Emphasis supplied)

In felony cases or cases in which a defendant is sentenced to the state penitentiary, a clerk is entitled to such fees as are provided in Section 3667, Code of Alabama, 1923, and may recover from the Fine and Forfeiture Fund such an amount due him as he did not collect from the Department of Corrections and Institutions, as provided for in Section 3667, supra. It is to be noted, however, that the amount which the Department of Corrections and Institutions is authorized to pay under the provisions of Section 3667, supra, is the same amount which may be taxed as costs in the case for making transcript, except for copy under Section 6108, Code of Alabama, 1923. I am of the opinion that a clerk may recover from the Fine and Forfeiture Fund in felony cases the fee of $2.50, as provided for in Section 6108, Code of Alabama, 1923, and if all the costs in a felony case exceed $250.00, which is the limit prescribed in Section 3668, Code of Alabama, 1923, then the unpaid part of the fee to which the clerk is entitled for preparing the transcript may be collected from the Fine and Forfeiture Fund. I wish to call to your attention, however, the fact that before the Fine and Forfeiture Fund of a county may be liable, under the circumstances, an execution must be returned "no property found." Such an execution may be issued on the judgment rendered by the appellate court.

There is no grave doubt in my mind as to the correctness of the opinion heretofore rendered by this office as to the source from which a clerk must collect his fees for preparing transcripts in misdemeanor cases or cases in which the punishment is fixed at imprisonment other than in the State penitentiary. When laws were enacted requiring the State to take over county convicts, it was provided in what is now Section 3702(6) as follows:

> "The state board of administration (department of corrections and institutions) shall receive said county convicts in the same manner as they now receive State convicts and shall pay to the proper county authorities the items of costs provided in Section 3667 of the Code of Alabama, as now provided by law."

It may be that the Legislature intended that in misdemeanor cases taken over by the State that the State would pay the same costs as in penitentiary cases. However, this office in an opinion rendered to Hon. R. H. Baker, Clerk of the Circuit Court of Barbour County, on the 28th day of May, 1936, Quarterly Report of Attorney General, Vol. III, page 145, held that a clerk shall collect fees for the preparation of transcripts in misdemeanor cases from the Fine and Forfeiture Fund, as provided in the last sentence of Section 3049, as amended, supra.

In view of the fact that the Department of Corrections and Institutions and its predecessor, the Convict Department, has for a long number of years followed the opinion of the Attorney General, I am unwilling to disturb that ruling.

Summarizing, it is my opinion that a clerk is entitled to be paid fees for the preparing of transcripts in criminal appeal cases in the following manner: (1) From the Fine and Forfeiture Fund in all cases where the judgment of the trial court is reversed and a new trial allowed or the defendant ordered discharged. (2) From the Department of Corrections and Institutions

in felony cases, under the provisions of Section 3667, Code of Alabama, 1923, which may be supplemented in certain cases out of the Fine and Forfeiture Fund, as provided in Section 4039, as amended, where an execution has been returned "no propetry found" against the defendant. (3) From the Fine and Forfeiture Fund in misdemeanor cases or cases where punishment is fixed at other than imprisonment in the State penitentiary, provided the defendant be first proved insolvent by the return of the execution "no property found."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

November 10, 1939.

Hon. Grady R. Williams,
Judge of Probate,
Lauderdale County,
Florence, Alabama.

Municipal corporations—Elections and electors—

Persons living outside the corporate limits of a municipal corporation, though owning property or having interests therein, are not entitled to vote in municipal elections provided for by statute (Code, 1923, Section 1881).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion dated October 31, 1939, which reads as follows:

"We have a number of citizens who live just outside the city limits, but who own property and have interest inside the city limits and they have raised the question whether they will be allowed to vote in the city election under Section 1881 of Code of 1923. Would those who live outside the city limits have a right to hold their citizenship inside the city limits and vote in Municipal elections?"

I am of the opinion that no person living outside the corporate limits of a city or town, however near he may reside to such city or town, or however much property or whatever interests he may own or hold therein, is entitled to vote at any municipal election held pursuant to Sections 1880-1887 of the Municipal Code of Alabama (Code, 1923, Sections 1880-1887).

The statute in question requires that the mayor of a city or town shall cause to be made duplicate copies from the registration list of the county in

which the city or town is located showing "the registered and qualified voters who reside within the corporate limits of such city or town." Of these copies, he is required to deposit one copy with the city or town clerk as a record in his office and to furnish the other copies to the inspectors at such elections; and in cases where the city is divided into wards, the mayor is required to make separate lists of the registered and qualified voters residing in each such ward.

Clearly, therefore, it was never the legislative intent that anyone residing without the corporate limits should vote at a municipal election whatever his property interests or rights might be within the corporate limits of the city or town.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

November 10, 1939.

Hon. P. C. Black,
Judge of Probate,
Geneva County,
Geneva, Alabama.

Deed and mortgage record—Tax Fee—Deeds, Mortgages, etc. (Acts 1935, p. 441, Sec. 348, Schedule 46, p. 456)

1. Instrument executed by beneficiaries under will of decedent and two heirs of decedent, excluded from will, whereby the former undertake to place the latter on equal footing with themselves so that all will share equally in the estate and to that end form a partnership composed of all and agree to employ the assets of the estate in the partnership business, upon probate of the will and appointment of executors named therein, and conveyance by executors of assets of the estate to the partnership, held not subject to mortgage and deed tax.

2. Such agreement is not a conveyance of property or an interest therein, but an executory agreement, and does not come within the terms of the Revenue Act, supra.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request of recent date which is as follows:

"Please advise me if I should charge tax on the enclosed Co-partnership Agreement."

From the recitals of the instrument submitted for examination and designated as Articles of Co-Partnership, dated August 1, 1939, and executed by the widow and seven children of the decedent, it appears that he died in July, 1939, leaving a last will and testament wherein the widow and five of said children were named as beneficiaries and no provision was made for the other two children.

It further appears that said will has not yet been offered for probate but that it will be so offered and that the beneficiaries, desiring that the two children excluded therefrom, so to speak, shall with themselves share equally the decedent's estate, share and share alike, have agreed to form a partnership which will take over, hold, manage and control all assets of the estate, except decedent's homestead, under the partnership agreement.

As I construe it, the instrument submitted for examination is an executory agreement, executed by all the heirs and next of kin, which cannot, however, be performed unless and until the will itself is admitted to probate and record, whereupon title to all the personal assets will vest in the executors and title to the real estate will vest either in the executors or such devisees, if any, as may be named therein.

In other words, under the state of facts disclosed by the instrument submitted for examination, it cannot be said that it conveys title to any property, real or personal, or to any interest therein. As above stated, it is merely an executory agreement, and until the will itself is admitted to probate and the conveyances and assignments of the assets belonging to the estate are executed and delivered by the executors to the partnership, the proposed co-partnership agreement is not effective or operative.

Therefore, inasmuch as it cannot be said that this instrument, to quote the language of the statute (General Acts 1935, page 441, Section 348, Schedule 46, pages 456-7) "conveys any real or personal property within this State" or "conveys any interest in such personal property" within the meaning of those terms, it is not subject to the excise tax or fee imposed for the privilege of record under the statute.

Of course, upon probate of the will and execution and delivery by the executors and/or devisees of the assets real and personal proposed to be conveyed to the contemplated partnership, such record tax or fee will be properly exacted.

Article VIII of the Co-Partnership Agreement reads as follows:

> "ARTICLE VIII. Upon probation of the will of T. S. Faulk and the appointment of the executors as named by him it is contemplated that these executors shall transfer, assign and convey all the property of T. S. Faulk, deecased, except the home of T. S. Faulk, in Samson, as heretofore excepted, to the new partnership under the trade name of T. S. Faulk & Company (new). This may be done under the terms of the will, but, of course, it is understood and agreed that all such transfers, assignments and conveyances are subject to the rights of creditors."

From this it will be seen that it is impossible at this time to estimate or compute any value of the two undivided one-eighth interests which the ben-

eficiaries wish to bestow upon the two children for whom no provision was made. Until there is final settlement of the estate of the deceased, involving the payment of debts and settlement of claims, there is no way in which to compute any tax provided by the statute. The above excerpt from the agreement of itself demonstrates the executory character thereof.

In further support of this opinion, reference is made to numerous definitions of the word "convey" and "conveyance" (13 C. J. p. 893):

> "In its legal meaning, ordinarily speaking, the term (convey) implies the transfer of property from one person to another by means of a writing or other formality. In this sense it has been defined as to transfer the **title** to realty; to transfer the title to property; to transfer the title of land from one person to another; to transfer the **legal title** to real estate from the present owner to another."

See **Lippman v. State**, 104 Ala. 61, 63; 16 So. 130, in which it is said:

> "The word **convey** when applied to a disposition of personal property has the signification of transfer; and means the passing of title and domain from one person to another."

See also the word **conveyance** as defined as follows:

> "Conveyance—The term is a technical or quasi-technical word of precise and definite import comprehending the several modes of passing title to real estate, and as used in the transfer of property seems to be a comparatively modern one *** a mode by which property is conveyed or voluntarily transferred from one person to another by means of a written instrument *** a transfer of title to land by one person to another; transmission of a legal title to real estate by appropriate conveyance from the person owning the estate to the person to whom it is conveyed; the act by which property in real estate is transferred."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 10, 1939.

Hon. W. Bentley Thomas,
Tax Assessor,
Jackson County,
Scottsboro, Alabama.

Taxation—Motor boats are not exempt from ad valorem taxation because of the fact that they are run on Government waters.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of October 30, 1939, in which you request my opinion as follows:

> "I am asking your opinion regarding the following:
>
> "We have several parties in this county, who own both out-board and in-board motor boats and claim they are exempt from taxes on same because of fact they run same on Government waters. Please give me ruling on this."

In answer to your inquiry, I am of the opinion that motor boats are not exempt from ad valorem taxation because of the mere fact that they are run on Government waters. I know of no provision of law which grants such an exemption.

Section 10(c) of the Revenue Act of 1935 provides as follows:

> "The subjects of taxation, except as exempted by law, should be as follows: *** (c) All steamboats, barges, vessels and watercraft of every name and kind, however propelled, plying waters of this State and the owner thereof shall return same for taxation to the assessors in the county wherein he resides and if such steamboat, barge, vessel and watercraft, is owned by a corporation, then in that county where its principal office is located. In case of owner being an individual not residing in this State or being a corporation with no principal office in this State, then in the county or counties where used. All such steamboats, barges, vessels or watercraft whether owned by a resident or non-resident of this State, which have acquired a permanent situs in this State. All transfer boats, steamboats or barges used by any railroad in transferring cars and passengers must be assessed and taxed in the county or countie where used, or where the owner resides, regardless of where such vessel may be registered."

In dealing with the taxation of boats and vessels, 61 C. J. 201, provides as follows:

> "Section 172. Ships. Boats and vessels are personal property, and are taxable like all other such property within the jurisdiction of the state, if within the terms of the tax statute invoked, there being nothing in their floating character and habitual change of location to exempt them from taxation."

See **National Dredging Co. v. State,** 99 Ala. 462, 12 So. 720.

In connection with the proper method of taxation of steamboats, barges, vessels and watercraft, I wish to refer you to an opinion of this office found in Quarterly Report of Attorney General, Vol. XIV, p. 48.

Assuming, for the sake of argument, that the title to the waters on which the boats are operated is in the Federal Government (a question we do not

decide), and that said boats are on these waters only and not removed therefrom, it is still my opinion that same are not exempt from ad valorem taxation by virtue of this fact.

In the case of State v. Blair, 191 So. 237, our Supreme Court stated as follows:

> " *** The Constitution of the United States in Article 1, section 8, clause 17, U. S. C. A., makes provision for the exercise by Congress of exclusive legislation over all places purchased by consent of the legislature of the state in which the same shall be, 'for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings.' 'Exclusive legislation' is consistent only with exclusive jurisdiction. James v. Dravo Contracting Co., 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155, 114 A. L. R. 318.
>
> "The mere ownership and use of the lands by the United States do not withdraw them from the jurisdiction of the state. But the above noted constitutional provision becomes applicable when the United States acquires the land with the consent of the state for the purpose there described. James v. Dravo Contracting Company., supra. *** "

Applying the above to our assumption of facts, it follows that the boats in question are taxable by the State as the properties acquired by the Federal Government were not acquired with the consent of the State for any of the purposes enumerated in Article 1, Section 8, Clause 17, U. S. C. A., viz: for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful buildings, but were acquired for other purposes. See **Biennial Report of Attorney General 1936-38, page 791; Mason, Inc., et al. v. Tax Commission of Washington,** 82 L. Ed. 154.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 10, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Filing tax—Mortgages, deeds, etc. given to instrumentalities and agencies of the United States, such as National Banks and Federal Land Banks, when offered for record by them, held not subject to State filing tax, unless Congress has assented or consented to such taxation.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of October 5, 1939, in which you request my opinion as follows:

"Please advise us in what way, if any, House Bill 57-Newman, approved March 2, 1939, affects this office. Under this bill would mortgages, deeds, etc. filed by National Banks and other Federal Agencies be subject to filing tax?"

The act to which you refer is Act No. 65, H. B. 57, approved March 2, 1939, (General Acts, 1939, Pamphlet Compilation, p. 95) which reads as follows:

"An Act to make taxable, property and activities of the United States and its agencies, except where the State of Alabama is without constitutional authority to impose such taxes.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. That property and activities of the United States and its agencies shall be taxable as other property and activities, except where the State of Alabama is without constitutional authority to impose such taxes.

"Section 2. All laws or parts of laws in conflict herewith are hereby repealed.

"Approved March 2, 1939."

It is a settled principal of constitutional law that instrumentalities and agencies of the United States may not be made the subject of taxation by any of the States, except as Congress assents or consents to such taxation, and then only in conformity with the terms and restrictions embodied in, or attached to, such assent or consent. **People v. Weaver,** 100 U. S. 539; **Rosenblatt v. Johnston,** 104 U. S. 462; **Mercantile National Bank v. New York,** 121 U. S. 138; **Talbott v. Silver Bow County,** 139 U. S. 438; **Owensboro National Bank v. Owensboro,** 173 U. S. 664; **First National Bank of Gulfport v. Adams,** 258 U. S. 362; **Des Moines National Bank v. Fairweather,** 263 U. S. 103;**First National Bank of Guthrie Center v. Anderson,** 269 U. S. 341.

The filing tax on deeds, etc. is levied by Schedule 46 of Section 348 of the 1935 Revenue Act, and the filing tax on mortgages, etc. is levied by Schedule 94 of Section 348 of the 1935 Revenue Act.

The Supreme Court of the United States in the case of **Federal Land Bank of New Orleans v. Crosland, Judge of Probate,** 261 U. S. 374, held a deed to the Federal Land Bank of New Orleans to be not subject to the filing tax on deeds which was levied by the State of Alabama at that time (Our present statutes, supra, levying a filing tax are identical in legal effect with the statute before the court in that case.) upon the well-settled constitutional ground above stated, the Federal statute pertaining to Federal Land Banks expressly

providing that such banks should be deemed "instrumentalities of the Government of the United States, and, as such, they and the income derived therefrom shall be exempt from Federal, State, municipal and local taxation."

Subsequently, this office, following this decision of the Supreme Court of the United States, has many times held that deeds, mortgages, etc. given to instrumentalities or agencies of the United States, such as National Banks and Federal Land Banks, when offered for record by them, were not subject to the filing tax levied by Schedules 46 and 94, supra, unless the Congress has given its assent or consent to taxation by the State of the particular instrumentality or agency of the United States to which the deed or mortgage, etc. is given, and which offers the same for record.

The premises considered, you are advised that Act No. 65, supra, does not subject deeds, mortgages, etc. given to instrumentalities or agencies of the United States to the filing tax levied by the schedules, supra, when offered for record by them, unless the Congress has given its assent or consent to taxation by the State of the instrumentality or agency to which the deed or mortgage, etc. is given, and which offers the same for record, for the reason that, in the absence of such assent or consent being given, the State of Alabama is without constitutional authority to impose such tax.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 10, 1939.

Hon. J. T. Longmire,
License Inspector,
Pickens County,
Carrollton, Alabama.

Licenses—Non-resident wholesale bottlers liable for license under facts given.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your request for official opinion of August 16, 1939, which follows:

"I have a case in my County where a Mississippi Coca Cola Company is selling Coca Cola wholesale and they refuse to pay license, they claim that they take orders but the orders are only blanket orders agreeing to take so much at a time, but the people he sells to only take such portion as they see fit and none if they don't want it. These orders are only taken once a year as I understand."

I am of the opinion that the Mississippi Coca Cola Company is liable for the license. Your attention is called to the 1935 Revenue Act, Schedule 129 and Schedule 147, which provide as follows:

"Schedule 129. Each person engaged in the business of selling wholesale non-alcoholic, carbonated or other soft drinks, shall pay an annual license of Fifty Dollars ($50.00). Provided that bottlers who have taken out bottle license for operating plants in this State shall not be liable under this Schedule, nor shall such bottlers be liable for any county or state license under Schedule 146 hereof, nor as transient vendors or dealers of peddlers."

"Schedule 147. Each person doing business as a TRANSIENT DEALER as defined in this Schedule and who does not pay the privilege license under Schedule 33, or the license permit under Schedule 159.16 shall pay an annual license tax to the State of $30.00. The payment of one State license shall authorize such transient dealer to engage in such business in any county in the State upon the payment of a county license of five ($5.00) dollars in each such county. *** "

In the case of **Curry v. Feld,** 190 So. 88, the Supreme Court of this State held:

"Where a foreign partnership sold cigarettes in this State through an agent who solicited orders and the partnership was paid for cigarettes by agent who in turn collected from customers, sales were 'intrastate' and were subject to both city and state tobacco tax. The tax does not burden interstate commerce in violation of the Constitution of the United States Federal Constitution Article 1, Sec. 8, U. S. C. A."

In the case of **Graybar Electric Company v. Curry,** 189 So. 186, the court held:

"Likewise it has been held by the same court that even interstate business must pay its way;" that "It was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of State tax burden even though it increases the cost of doing business."

Western Livestock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546, 548, 82 L. Ed. 823, 115 A. L. R. 944.

It is not "within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause." **Superior Oil Co. v. State of Mississippi ex rel. Rush H. Knox, Attorney General,** 280 U. S. 390-396, 50 S. St. 169, 170, 74 L. Ed. 504; **Browning v. Waycross,** 233 U. S. 16. 23, 34 S. Ct. 578, 58 L. Ed. 828-832.

It will be observed that the non-resident pays the same amount as the resident taxpayer. The dangers of inequality and discrimination which brought about the rule that no state may tax interstate commerce does not exist in this case. The license required does not prejudice interstate com-

merce. To free such nonresidents from liability would confer on extra-State wholesale bottlers of soft drinks a competitive advantage and would result in tax burden inequities between the extra-State wholesaler and the intra-state wholesaler to the prejudice of local business in Alabama.

The Supreme Court of Alabama in the case of **Graybar Electric Company v. Curry,** supra, has stated in no uncertain language that "It is not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to State control, into an interstate 'commerce business.'" A careful examination of the facts stated in your request shows that there was no definite order as to the amount of Coca Cola transmitted from the buyer to the nonresident seller but on the other hand, the nonresident seller merely loaded his trucks with cases of Coca Cola, brought them into the State and permitted buyers to take any number of cases they needed. In my opinion, this case falls within the express holding of the Supreme Court in the Graybar Electric Company case, supra, in that the parties cannot by a contract convert a local business into an interstate commerce business.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 10, 1939.

Hon. R. F. Lyon,
County Treasurer,
Shelby County,
Columbiana, Alabama.

Costs and fees—Fine and Forfeiture Fund—

1. Where defendant is convicted and sentence suspended under Act which is later held unconstitutional and case later dismissed, witnesses and officers' fees may be collected out of the Fine and Forfeiture Fund if execution is issued and returned "no property found."

2. Where defendant is convicted and sentence suspended under Act which is later held unconstitutional, and there is no judgment for costs, witnesses and officers' fees may not be paid out of the Fine and Forfeiture Fund.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion date October 12, 1939, which reads as follows:

"In Shelby County, we have a number of cases in the courts wherein the defendants were convicted and placed on probation, sentences being suspended during time of probation. The law providing for such proceedure has since been declared unconstitutional. Now I find that the courts have 'dismissed' or nollprossed these cases, thus closing them entirely.

"Will you please advise me, officially, now that these cases have been 'dismissed.'

"1. Can officers' fees and State witnesses' fees be legally registered against the Fine and Forfeiture Fund?

"2. If you answer the first inquiry in the negative, may execution issue against defendants for cost, and if returned, 'no property found,' can said officers' and witnesses' fees be legally registered against the Fine and Forfeiture Fund?

"3. If you answer both these inquiries in the negative, please advise me if there is a legal procedure for collecting these fees. I shall thank you for an early reply."

Upon request for further information as to the judgment entries in the above cases, I am advised by you under date of October 21, 1939 that in some of these cases the judgment entries show that there was a judgment for costs and in others there was no judgment for costs.

I will first deal with the cases in which the judgment entries show that there was a judgment against the defendants for costs.

The Act known as "The Suspended Sentence Act" (General Acts 1932, page 45) was held to be unconstitutional in the case of **Montgomery vs. State,** 26 Ala. App. 334, 163 So. 371. This office has repeatedly held that, even if the Supreme Court had held this Act to be constitutional, the judges of the various courts of Alabama are without power or authority to suspend sentences for costs. **Biennial Report Attorney General,** 1932-34, page 265. This being true, I see no reason why execution cannot now issue in such cases, and if returned "no property found," the State witnesses' fees and the officers' fees will become a charge against the Fine and Forfeiture Fund of the County, under Sections 3763, 3769 and 4039 of the Code of 1923. **Quarterly Report, Attorney General,** Vol. I, page 242; Section 7863, Code of Alabama, 1923.

The above, as to State Witnesses' fees, is based on the assumption that the certificates were properly issued, presented for payment and registered as required by law.

As to the cases in which the judgment entries do not show a judgment for costs, you are advised that in my opinion the costs in these cases are not chargeable against the Fine and Forfeiture Fund of the county. Before an execution could issue against the defendants for costs in these cases, there must be a judgment upon which such execution could issue. In the absence of the judgment, no execution can issue. **Quarterly Report,** Vol. II, page 118.

You state in your request that these cases have been dismissed or nol prossed by the Court. The copies of judgment entries enclosed in your letter

of October 21, 1939 show that these cases were tried in 1932, and the defendants were sentenced in that year. These judgment entries show that no further order or action was taken by the Court in these cases until July 13, 1939, when an order of dismissal was entered by the Court.

Section 6670 of the Code of 1923 reads as follows:

> "6670. Execution on judgments; new trial must be asked in thirty days.—After the lapse of ten days from the rendition of a judgment or decree, the plaintiff may have execution issued thereon, **and after the lapse of thirty days from the date on which a judgment or decree was rendered, the Court shall lose all power over it,** as completely as if the end of the term had been on that day, unless a motion to set aside the judgment or decree, or grant a new trial has been filed and called to the attention of the court, and an order entered continuing it for hearing to a future day."

It will be noted from the above Code section that after a lapse of thirty days from the date on which the judgment is rendered the Court loses all power over the case, unless a motion to set aside the judgment, or grant a new trial has been filed within such time, and called to the attention of the Court, and an order of continuance entered continuing such motion for hearing to a future date.

As pointed out above, the judgment entries in these cases show that no action whatsoever was taken thereon from 1932 until 1939, when the orders of dismissal were entered. It necessarily follows that under the provisions of Section 6670, supra, the order of dismissal entered in 1939 was void and of no effect.

Therefore, since the order of dismissal in these cases was null and void, the State witnesses and officers' fees cannot be a claim against the Fine and Forfeiture Fund of the County based on this dismissal or nolle prosequi as the term "nolle prosequi" used in Sections 3763, 3769 and 4039 of the Code of 1923 refers to a valid nolle prosequi or dismissal.

If defendants in the last mentioned cases will not voluntarily pay the costs therein, I know of no legal procedure for the collection of these costs. No part of these costs would be payable out of the Convict Fund, as none of the defendants were ever turned over to the State Authorities. **Section 3670 Code of 1923; Quarterly Report, Attorney General,** Vol. XII, page 168.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 10, 1939.

Hon. D. M. Weakley, Supt.,
Alabama Boys Industrial School,
Birmingham, Alabama.

Alabama Boys Industrial School—Appropriations—

Appropriation of $10,000.00 to Alabama Boys Industrial School for erection of buildings and to purchase or complete the purchase of lands contained in the General Appropriation Act (Act No. 247, S. 239, approved August 24, 1939) may not be used for the repair of buildings belonging to the School.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of October 31, 1939, in which you request my opinion as follows:

"In the General Appropriation Bill No. 247, S. 239-Tucker, approved August 24, 1939, there was appropriated to the Alabama Boys Industrial School, as follows:

" 'For erection of buildings and to purchase or complete the purchase of lands $10,000.00."

"Please advise us, if in your opinion this $10,000.00 or any part of it can be used for the repairs of buildings belonging to this School."

Subdivision 5 of Subsection (X) of Section 1 of Act No. 247, S. 239, approved August 24, 1939, and effective October 1, 1939, which is generally referred to as the General Appropriation Act, contains the appropriation to the Alabama Boys Industrial School and reads as follows:

"5. Alabama Boys Industrial School: For the maintenance, support, insurance, and upkeep of the Alabama Boys Industrial School, an annual amount to be drawn quarterly in advance by the Treasurer of the Board of the Alabama Boys Industrial School, and to be disbursed as directed by said Board $108,883.89. Any balance from this annual appropriation of $108,883.39 at the end of any fiscal year shall remain in the hands of the Treasurer of said Board and shall not revert to the State Treasurer. For erection of buildings and to purchase or complete the purchase of lands $10,000.00, $118,883.89."

In my opinion, the $10,000.00 appropriated therein for the erection of buildings and to purchase or complete the purchase of lands or any part thereof may not be used for the repair of buildings belonging to the Alabama Boys Industrial School. The purpose for which this $10,000.00 was appropriated is expressed in plain, clear and unambiguous language, viz., for the erection of buildings and to purchase or complete the purchase of lands. Its expenditure for any other purpose would, in my judgment, be unauthorized. One of

the fundamental rules of statutory construction is that where the language of a statute is clear and the intent is obvious, there is no room for construction, and in such a case the language should be given the meaning therein plainly expressed, the courts having discretion in construing statutes only where the meaning is doubtful. **City of Birmingham v. Southern Express Co.,** 164 Ala. 529, 51 So. 159; **L. & N. R. R. Co. v. Western Union Telegraph Co.,** 195 Ala. 124, 71 So. 118; **Kreutner v. State,** 202 Ala. 287, 80 So. 125; **Tucker v. McLendon,** 210 Ala. 562, 98 So. 797; **State v. Praetorians,** 226 Ala. 259, 146 So. 411; **Abramson v. Hard,** 229 Ala. 2, 155 So. 590; **State v. Tuscaloosa Building & Loan Association,** 230 Ala. 476, 161 So. 530; **Bozeman v. State,** 7 Ala. App. 151, 61 So. 604; certiorari denied **Ex parte Bozeman,** 183 Ala. 91, 63 So. 201; **Daley v. State,** 13 Ala. 310, 69 So. 338; **State v. H. G. Fain Service Station,** 23 Ala. App. 239, 134 So. 119, certiorari denied 220 Ala. 55, 124 So. 121.

The conclusion that this particular $10,000.00 may not be used for the repair of buildings belonging to the Alabama Boys Industrial School is strengthened by the fact that the other part of the appropriation to this institution in the amount of $108,883.89 is "for the **maintenance,** support, insurance and **upkeep** of the Alabama Boys Industrial School." (Emphasis supplied) No doubt, the Legislature intended by the use of the language last above quoted, and particularly the emphasized words therein, that the $108,883.89, and not the $10,000.00, appropriated to the Alabama Boys Industrial School, be used for the repair of buildings belonging to that institution.

Cf. Opinion to Hon. Chas. W. Lee, State Comptroller, Capitol, under date of July 7, 1936, Quarterly Report of Attorney General, Vol. IV, page 10.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 13, 1939.

Dr. M. L. Moorer,
Assistant Physician,
The Searcy Hospital,
The Alabama Insane Hospitals,
Mount Vernon, Alabama.

Department of Conservation—Alabama Insane Hospitals—Hunting on State Lands—

Under the provisions of Section 4224 of the Code of 1923, all lands belonging to the Alabama Insane Hospital are made game refuges, and permission to hunt thereon can only be granted under conditions and regulations prescribed by the Director of Conservation.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated November 6, 1939, which follows:

> "We have had quite a discussion recently as to whether the custodian of the Alabama Insane Hospital lands could give one permission to hunt on it in season. Some say you can and others say you can't. It seems that this same thing came up several years ago at Atmore on the Prison Farm and I am of the impression that it was ruled that they could hunt on State Land provided they had permission from the custodian. There are other opinions that the Alabama Insane Hospital lands are separate and distinct from the other state lands and one could hunt on it with permission from the custodian. In recent years it has been the custom to hunt on hospital lands with permission from the custodian, but recently one of our hospital nurses was arrested and fined in a magistrate court here thirty some odd dollars for hunting on Alabama Insane Hospital lands. Since the hunting season is approaching we would like to know just what the ruling is, and will appreciate hearing from you at your earliest convenience."

In my opinion permission to hunt on lands belonging to the Alabama Insane Hospital can only be granted under conditions and regulations prescribed by the Director of Conservation.

Your attention is called to Section 4224 of the Code of 1923, which reads as follows:

> "4224. Lands held in fee or trust by state declared forest reserves and game refuges.—All lands belonging to the State of Alabama, whether held in fee or in trust by the state, are declared forest reserves and game refuges."

It is true that the title to the lands of the Alabama Insane Hospitals is vested in its Board of Trustees, but the same are held in trust by the State of Alabama. **White v. Alabama Insane Hospitals,** 138 Ala. 479, 35 So. 454; **Englebert v. Verner, et. al.,** 218 Ala. 326, 118 So. 745. Therefore, the lands of the Alabama Insane Hospitals come within the purview of Section 4224, supra, and such lands are declared to be game refuges under the provisions thereof.

Section 4226 of the Code of Alabama, 1923, reads as follows:

> "4226. Unlawful to hunt on state lands; regulations as to.—It shall be unlawful for any person to kill, hunt, trap, net or otherwise take, or to have in possession, any of the wild animals or birds, protected by the laws of this state, upon any state forest reserve or game refuge, except under regulations of the commissioner of conservation."

Under the provisions of Section 4 of Act No. 162, H. B. 52, approved March 14, 1939, page 255, General Acts of 1939, all of the functions and duties of the Commissioner of Conservation are conferred on the Director of Conservation, created thereby.

It is clear from the above that the Director of Conservation must prescribe rules and regulations for hunting on State game refuges, and in my opinion he is the only person who has authority to prescribe such rules and regulations. Biennial Report of Attorney General, 1928-30, page 129.

However, I know of no provision of law that would prohibit the Director of Conservation from prescribing a rule or regulation designating the Custodian of the Alabama Insane Hospitals' lands, as agent for the purpose of issuing permits to hunt on such lands.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 13, 1939.

Hon. H. J. Brogden,
Judge of Probate,
Covington County,
Andalusia, Alabama.

Counties—Judge of Probate—Premium on burglary or robbery insurance—

County authorized to pay premium on burglary or robbery insurance policy, designed to protect the funds of the county, in the hands of the Judge of Probate, against loss through burglary or robbery, even though the beneficiary named in the policy is the Judge of Probate in his official capacity, instead of the county.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 6, 1939, in which you request my opinion as follows:

"I procured burglary and robbery insurance payable to myself in my official capacity as Judge of Probate of Covington County. I sought protection against burglary of my office safe wherein I kept state and county funds, and against robbery in the office and while transferring these funds to a lawful depository, The First National Bank of Opp, which is 15 miles from the county site, said depository being designated by the Court of County Commissioners. This policy costs me about $32.00 per year. I feel that I need this protection because I have to carry over money at times due to the fact that we stay open until 5 or 6 o'clock in the afternoons during the busy season collecting licenses and tax and the banks in this section close about two o'clock, and besides we have a good sum of money on hand at this season of the year, and of course get it in the depository as speedily as possible. I have made two trips to Opp today and carried my cash on hand and carried $2702 in cash besides checks last Saturday.

"About 25% or 30% of this money belongs to Covington County, the balance belongs to the State, Cities and various school districts in Covington County. Please see the opinion of your office, dated October 18, 1935, to the Hon. Fleetwood Rice, Judge of Probate, Tuscaloosa, Ala., reported in the Biennial Report of the Attorney General 1934-36, pp. 349-50. Please answer questions as follows:

"1. Does the fact that the policy made to me in my official capacity relieve the county of all liability with respect to the payment of the premium, and if not, for what portion of the premium is the county liable?

"2. If you state that the county is responsible only for that part of the premium I have paid as was due on an amount of insurance reasonably necessary to protect the county from loss, then please state if the remainder of the premium is chargeable to the State?

"3. At times at the close of the rush season for tags I have to carry over enough of the county's money to the amount of the full face of the burglary policy, could the county legally pay this premium?

"I have carried a burglary policy as outlined above for five years but every examiner that comes has a different opinion about it and I have cancelled my burglary policy rather than be worried with them. A safe safe was robbed last night within 100 yards from my office which has put me to thinking to the extent that I am trying to get your legal opinion to clear up this matter to where I can get a policy and have a ruling clear enough to be understood by all the Auditors."

In the opinion referred to in your letter of inquiry, it was held that, pursuant to the statutory authority therein cited, which is Subdivision 24 of Section 6755, Code of Alabama, 1923, after said section was amended by Act No. 622, H. 1100, approved July 31, 1931 (General Acts, 1931, p. 759), the county had authority to pay the premium on burglary and robbery insurance for the protection of funds of the Tax Collector and Probate Office, provided said funds were the property of the county. Very clearly, under the holding of that opinion, the premium on a burglary or robbery insurance policy, designed to protect the funds of the county in your hands, as Judge of Probate, against loss through burglary or robbery, with the county named as the beneficiary therein could be paid for by the county.

In my judgment, the fact that such a policy named the Judge of Probate, in his official capacity, as the beneficiary, instead of the county, would not affect the authority of the county to pay the premium on same, for the reason that, while the Judge of Probate is the nominal beneficiary in the policy, the county would be the actual beneficiary as the funds insured against loss by such policy are the property of the county. In the case of **State v. Houston,** 78 Ala. 576, we find the following statement of the rule in regard to the liability of an official for the loss of funds in his custody through burglary or robbery:

"If the collector, having exercised the highest degree of care, diligence and vigilance to prevent loss, is robbed of the public moneys by irresistible force, which he could not have foreseen or guarded against, this

constitutes a good defense to an action on his official bond; but, if the money of which he was robbed was not the same money which he had collected, or if he had committed an official default by his failure to pay the money into the treasury as by law required, such robbery would be no defense."

Cf. Opinions to Hon. W. W. Brandon, Judge of Probate, Tuscaloosa County, Tuscaloosa, Alabama, under date of November 17, 1931, (Biennial Report of Attorney General, 1930-32, page 560); to Hon. Frank O. Deese, Judge of Probate, Dale County, Ozark, Alabama, under date of January 7, 1937 (Quarterly Report of Attorney General, Vol. VI, p. 14); and to Hon. M. E. Marlette, Clerk, Circuit Court, Lowndes County, Hayneville, Alabama, under date of May 31, 1939, (Quarterly Report of Attorney General, Vol. XIV, p. 251).

Thus, it can be seen that where public moneys in the hands of an official are lost by burglary or robbery and through no fault or negligence or dereliction of duty on his part, he and his official bondsmen are not liable for the loss, and it thus becomes a loss on the part of the public fund to which the money belonged. With this rule prevailing, it would be of no personal interest or benefit to you to have the funds of the county in your hands, as Judge of Probate, insured against loss through burglary or robbery, except in the event that you contributed to such loss by the commission of some official default or dereliction of duty, but, on the contrary, it would be of benefit to the county. Even in the event that the circumstances surrounding the loss of funds of the county in your hands, as Judge of Probate, through burglary or robbery were such that you and your official bondsmen would be liable for the loss, it would still be of benefit to the county to have this insurance policy against such loss as additional security and protection to it. Consequently, it is my judgment that the premium on such a policy may be paid by the county, even though you, in your official capacity, are the beneficiary named therein.

Even though funds belonging to the State which are in your hands, as Judge of Probate, might be covered by such a policy at times when the funds of the county in your hands are less than the amount covered by the policy, this fact is not material to the question of authority of the county to pay the premium on such a policy, provided the amount of the policy is only such as is reasonably designed to protect the funds of the county in your hands, as Judge of Probate, from loss through burglary or robbery.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 13, 1939.

Hon. E. W. Vance, Member,
Board of Revenue, Barbour County,
Eufaula, Alabama.

Counties—Under Section 1452 of the Code of Alabama, 1923, counties are liable for traveling expenses incurred in returning patient from insane hospital to home when friends and relatives have been notified of patient's recovery and they have failed or refused to furnished necessary traveling expenses.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion under date of October 13, 1939, which reads as follows:

"The attached bill from the Alabama Insane Hospital has been received by the Board of Revenue of Barbour County. It is for expense of an indigent patient returned home from the asylum. We are aware that Section 1452 of the Code of 1923 provides that the County shall pay such expense; but, that section provides that the asylum authorities shall inform the friends and relatives of the patient's recovery, and if they do not furnish the money to pay the traveling expenses, they shall then notify the Judge of Probate of the County from wherever the patient comes, and the County shall then pay the expenses home.

"In this case the Steward of the asylum makes oath that the patient was an indigent patient, but makes no mention of the notice to the 'friends and relatives' as set out in said Section 1452.

"Please advise if the Board of Revenue is permitted to pay the bill enclosed. We will thank you for this opinion, and the return to us of the attached claim of the hospital."

In reply to your inquiry, attention is called to section 1452 of the Code of Alabama, 1923. Said section is as follows:

"1452. Return of patients home; expenses of same.—When a patient has been restored to a normal or comparatively safe and good mental condition sufficiently long to warrant the opinion on the part of the superintendent that he (or she) ought to be returned to his (or her) home or set at large again, the superintendent shall inform the friends or relatives of the patient's recovery, and if they do not furnish the money to pay the traveling expenses, he shall notify the judge of probate of the county whence the patient came, and the commissioners of said county shall pay, out of the county treasury, the necessary traveling expenses of the return of the patient to his home in that county."

It will be noted from a reading of the above section, supra, that before a county becomes liable for the traveling expenses incurred in returning a patient of an insame hospital to his (or her) home, the Superintendent of

said institution must first inform the friends and relatives of the patient's recovery and they in turn must have failed to furnish the necessary traveling expenses. It is only after the friends and relatives of the patient have failed to furnish the necessary traveling expenses that the Superintendent can call upon the county to pay said expenses. The notifying of the friends and relatives of the patient's recovery and their failure to furnish the necessary traveling expenses constitutes a condition precedent to the liability of the county, under this section.

The facts set forth in your letter coupled with the claim filed by the Alabama Insane Hospital fails to show that the friends and relatives of the patient had been notified of his recovery and had failed or refused to furnish the necessary traveling expenses for the return of the patient to his home. It is true the claim describes the patient as "indigent" but this does not necessarily import that his friends and relatives have failed or refused to furnish the necessary traveling expenses or even that they have been notified of the patient's recovery by the Superintendent of the institution.

The claim fails to meet the requirements of the statute necessary to invoke the liability of the county and therefore it is my opinion that the claim cannot be legally paid under Section 1452, supra.

I suggest that the Insane Hospital incorporate in its claim the statement that conforms to the requirements of this statute. When this has been done, the county will become liable for the claim in question.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 13, 1939.

Hon. W. M. Vaughan,
Judge of Probate,
Dallas County,
Selma, Alabama.

Counties—Under Act No. 195, House Bill 381, approved March 2, 1937, General Acts, 1936-37, page 226, counties affected may furnish probate judge with electric fans.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of November 2, 1939, in which you request my opinion as follows:

"The State Examiners who are examining the books of the Court of County Revenues of this County have charged back the amount of the purchase of two electric fans, totaling about $50.00.

"I have called their attention to General and Local Acts of Alabama 1936-1937, page 226, which authorizes the expenditure by counties having a population of 47,000 and not more than 57,000 to expend as much as $1,200.00 for anything they choose.

"Dallas County comes within this statute having less than 57.000 and more than 47,000.

"Inasmuch as you have rendered several opinions that a County has no authority to purchase electric fans, I would be glad if you would write me at once for the benefit of examiners now in my office that we do not come within the provisions of your former opinions on account of the special act excluding us by authorizing this expenditure. We have not otherwise used this $1,200.00 allowance."

Courts of County Commissioners or Boards of Revenue are courts of limited jurisdiction except as to roads, bridges, ferries, etc., as provided for by Section 6754 of the 1923 Code of Alabama. **Edwards v. Bibb County,** 193 Ala. 554, 69 So. 449.

As a general rule, there is no authority for a county to furnish the probate judge electric fans. This office has so held in a recent opinion to Hon. Edgar Underwood, Judge of Probate, Franklin County, Russellville, Alabama, under date of August 19, 1939, Quarterly Report of Attorney General, Vol. XVI, page 177.

However, there is applicable to Dallas and Calhoun Counties a general act with local application. That act is No. 195, House Bill 381, approved March 2, 1937, General Acts, 1936-37, page 226, which is as follows:

"An Act to authorize and empower Boards of Revenue in Counties having a population of not less than 47,000 and not more than 57,000 inhabitants according to the Federal Census of 1930, and which may hereafter have such population according to any Federal Census hereafter taken, to expend County funds not exceeding twelve hundred ($1200.00) Dollars per annum for county purposes not otherwise provided for by law.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. That Courts of County Commissioners, Boards of Revenue, and other Courts of like jurisdiction, in counties in this State having a population of not less than 47,000 and not more than 57,000, according to the Federal Census of 1930 and which may hereafter have such population according to any Federal Census hereafter taken, are hereby authorized to appropriate out of any monies in the County Treasury not otherwise appropriated and to expend not exceeding the sum of twelve hundred ($1200.00) Dollars per annum for any county purposes not otherwise provided for by law that in their judgment are worthy and for the interest of the county.

"Section 2. That under the provisions of Section 1 not more than twelve hundred ($1200.00) Dollars shall be appropriated and expended in one year.

"Section 3. That all laws and parts of laws in conflict with the foregoing be and the same are hereby repealed.

"Approved March 2, 1937."

It is my opinion that under this Act, the governing bodies of the various counties affected thereby could purchase electric fans for the probate judge's office, subject, of course, to the limitation of $1200, as provided for in said Act.

This office has heretofore held in an opinion to Hon. B. P. Singleton, Chief Examiner of Public Accounts, on March 25, 1939, Quarterly Report of Attorney General, Vol. XIV, page 233, that Montgomery County, under an act similar to the above quoted act, could purchase an automobile, pay the expenses of operating same, furnish telephone, envelopes. letter heads, etc. for the License Inspector.

It is my opinion that the same situation is present here and that under the above quoted act the governing bodies of the various counties affected thereby may expend $1200 per annum for any county purpose not otherwise provided for by law that in their judgment is worthy and for the interest of the county.

The act to which you referred in your request was not considered by me in the opinion released to you on August 5, 1939, wherein it was held that the Board of Revenue could not furnish the Sheriff of Dallas County with a motor boat.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 13, 1939.

Dr. J. N. Baker,
State Health Officer,
Montgomery, Alabama.

Health and Sanitation—

Counties and municipalities have authority to make appropriation out of General Funds, not otherwise appropriated to provide for maintenance of drainage canals used in connection with control of malaria.

State Board of Health may expend its funds for maintenance of drainage canal used in connection with control of malaria provided it is included in annual budget.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of October 11, 1939, in which you request my opinion as follows:

"Through the aid of the federal government, the State Department of Health during the past six years has sponsored and given technical direction for several projects involving the drainage of breeding areas of malaria transmitting mosquitoes. A recent study by the Regional Engineer of the Works Progress Administration of the statewide project now in operation for this purpose and involving seventeen counties prompted him to make certain recommendations which he felt would enhance the benefits of the project if adopted. One of these was that arrangements be made to provide maintenance by a tax supported agency, State, county or municipal—such maintenance by a tax supported agency to be made a requirement for the approval of any unit. (The 'unit' here referred to is a ditch or a system of ditches constructed by Works Progress Administration through releases secured by this department from land owners and municipalities, for the purpose of reducing malaria by eliminating ponded water suitable for the breeding of the malaria transmitting mosquito).

"Now the question arises as to the extent that the State, through any of its agencies, the county, and an incorporated municipality can participate in providing maintenance of such ditches; also, from what funds, if any, this work could be financed."

Answering your inquiry, I call your attention to the case of **Hard v. Baker,** 228 Ala. 517, 154 So. 77, wherein Justice Bouldin used the following language:

"Our system of laws, enacted under the police power, for the promotion of safeguarding of the public health, as they now exist, have been the outgrowth of legislation for more than half a century. Besides numerous acts dealing with special matters, there have been numerous compilations, such as the act of 1903 (General Acts, 1903, p. 499); the Code of 1907, Sec. 698 et seq.; Act of 1919 (Gen. Acts 1919, p. 909); the Code of 1923, Sec. 1046 et seq., and finally Michie's Code, Sec. 1046 et seq., incorporating acts of the 1927 session."

A later compilation appears in Michie's 1936 Cumulative Supplement to the Alabama Code of 1928, Section 1048 et seq., incorporating the acts of the 1931, 1932 Extra Session, and 1935 Session of the Legislature.

An examination of the various acts of the Legislature and the Constitution of Alabama fails to disclose any generally applicable authority vested either in the State Board of Health or the County Board of Health to levy any tax on property for the support of any projects.

The State Board of Health has a limited appropriation each year. The expenditure of its funds must be in accordance with an annual budget prepared by the State Health Officer with the approval of the State Board of Health.

The premises considered, I am of the opinion:

First. The State Board of Health has the authority to expend its appropriations for the preservation, furtherance, or maintenance of public health in this State in accordance with an annual budget prepared by the State Health Officer with the approval of the State Board of Health. Acts of 1935, page 771.

Second. The expenses of maintenance of drainage canals used in connection with malaria control projects may be paid out of the general funds of the county not otherwise appropriated. This may be done by appropriate action taken by the Court of County Commissioners or like governing body of the counties. Quarterly Report of Attorney General, Vol. I, page 104.

Third. The Courts of County Commissioners or like governing bodies of the counties have authority to initiate and propose to the State Board of Health that the counties' share of the receipts from the sales tax be used for maintenance of drainage canals used in connection with malaria control projects and if the State Board of Health approves the action of the board, this fund may be used.

Fourth. The incorporated municipalities have authority to make an appropriation out of the general funds of the city not otherwise appropriated to provide for the maintenance of drainage canals used in connection with malaria control. Code of 1923, Sections 1056, 1060.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 13, 1939.

Hon. Jeff D. Smith, Solicitor,
Twenty-third Judicial Circuit,
Huntsville, Alabama.

Neither the State nor the county is authorized to pay the expenses of sheriff for bringing witness from another state to testify in a criminal case in this State.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 26, 1939, in which you request my opinion as follows:

"RE: STATE VS JIM McANNALLY.

"In reference to the above case Jim McAnnally is charged with murder in the first degree. After the crime was discovered he was arrested in the State of Texas and returned to Madison County.

"After his arrest in Texas he was placed in a cell with a man, who is now serving a sentence there for forgery. While in this cell Jim McAnnally confessed this murder to this cell mate. We have a sworn statement from the cell mate in our possession.

"I am confident that the authorities of the State of Texas will permit our Sheriff to bring this witness from Texas to Huntsville for this trial.

"I would thank you to advise me as to the means by which the Sheriff of Madison County can receive his expenses for going for and returning this witness to the State of Texas.

"I might add that this witness will be a material one on the trial of this cause.

"As the trial of this defendant is scheduled for the week of November 20th, I would appreciate an answer at an early date."

I know of no provision of law of this State which expressly authorizes the payment of the expenses of any officer incurred in bringing to this State a witness who is located without the State.

The Courts of this State have heretofore held that a witness in a criminal case is entitled to mileage only from the State line and is not entitled to mileage from the place from whence he came, located without the State. **Friddle v. Braun, et al.,** 7 Ala. App. 429, 61 So. 57; Biennial Report of Attorney General, 1928-30, page 763; Quarterly Report of Attorney General, Vol. VI, page 107.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 14, 1939.

Hon. John D. Petree, Director,
Department of Industrial Relations,
Montgomery, Alabama.

Publication—Newspapers—Advertisement—

The provisions of Section 9262 of the 1923 Code of Alabama, in regard to costs of publications, apply only to legal notices and advertisements.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated November 1, 1939, which reads as follows:

"I wish to refer you to a matter which has arisen in connection with the functions of the Employment Service Agency of the Department of Industrial Relations.

"This Agency has made insertions in the classified ad column of a Mobile daily paper in an effort to obtain employment for workers appearing on its register. The newspaper made a charge of $3.30 which was at a rate of fifteen cents a word for twenty-two words appearing in seven insertions. When a bill for this advertising was presented, the State Comptroller refused to approve payment of this amount. He maintains that he cannot pay a greater amount than that authorized by the provisions of Section 9262 of the 1923 Code of Alabama, which is as follows:

" 'Costs of publication.—Not more than one and one-half cents per word for the first insertion, and one cent per word for each subsequent insertion of a legal notice or advertisement must be charged or allowed; but in case it is advisable to advertise in daily newspapers, any person required to advertise such notice may contract with such papers to charge their then current published commercial rates, and the insertion must not be oftener than once a week, unless in certain cases of sales under a decree of the circuit court in equity, the court shall otherwise order. Each amount or number expressed in figures and each initial letter shall constitute one word. The year, month and day shall each constitute one word, in all three words. In estimating the number of words in a notice, an appropriate caption may be included; but no memorandum of the printer must be included.'

"For your information, in the case at hand, the Comptroller advises that he will pay for eighteen words instead of twenty-two, or a total of $1.35, which he computes as follows:

First insertion

1½ X 18	.27

Next six insertions

1c x 18 x 6	1.08
	$1.35

"Since this department contemplates using this type of advertising from time to time in the future, we are anxious to have a ruling from you as to the exact status of such advertising. In particular, we are interested to know whether or not this type of advertising comes within the purview of Section 9262 as herein quoted."

Before proceeding to an answer to your request, permit me first to point out that the Employment Service Agency of the Department of Industrial Relations has authority to publish such notices as described in your request.

Your attention is called to Act No. 447, S. B. 395, approved September 14, 1935 (General Acts, 1935, page 950). This Act is known as the Unemployment Compensation Law and establishes the Unemployment Compensation Commission. Under the provisions of Section 8 of Act No. 161, H. B. 51, approved March 14, 1939 (General Acts of Alabama, 1939, Pamphlet Compilation, page 232) the Unemployment Compensation Commission is abolished, and all its powers, duties, and functions are transferred to the Director of Industrial Relations. Your attention is further called to an amendment to Act No. 447, supra, which is Act No. 497, S. 440, approved September 21, 1939, and particularly to Subsection (f) of Section 10 thereof, which reads as follows:

> "(f) Employment Stabilization. It shall be one of the purposes of this Act to promote the regularization of employment in enterprises, localities, industries in the state. The Director, with the advice and aid of the advisory councils, shall take all appropriate steps within his means to reduce and prevent unemployment; to encourage and assist in the adoption of practical methods of vocational training, retraining and vocational guidance; to investigate, recommend, advise and assist in the establishment and operation, by municipalities, counties, school districts and the State, of reserves for public works to be used in times of business depression and unemployment; to promote the reemployment of unemployed workers throughout the State in every other way that may be feasible; and to these ends to employ experts and to carry on and publish the results of investigations and research studies."

It will be noted from the above that it is the duty of the Director of Industrial Relations to "promote the reemployment of unemployed workers throughout the State in every other way that may be feasible." Certain it is that it is feasible, in promoting reemployment, to run advertisements in newspapers asking the general public to contact the Employment Service Agency of your Department, when part time or permanent employees are needed.

Section 9262, referred to and quoted in your request, is found in Chapter 324 of the Code of 1923. I call your attention to the fact that this chapter is headed: "NOTICES AND HOURS OF SALE." It is clear from this heading that notice and hours of sale as used therein, refer to legal sales; as it is not necessary, and there are no legal requirements for a private individual to advertise a private sale, unless he wishes to attract a crowd for said sale.

I further call your attention to the language of Section 9262, supra, which in part reads as follows:

> "Not more than 1½c per word for the first insertion, and 1c per word for each subsequent insertion for a **legal notice or advertisement** must be charged or allowed." (Emphasis supplied)

The language used in this section is clear and unambiguous, and it clearly appears therefrom that the rates of charges provided for therein apply only to legal notices or advertisements.

I am of the opinion that the notice or advertisement described in the above request is not a legal notice or advertisement and therefore does not come within the purview of Section 9262, supra.

I know of no provision of law that would prohibit a newspaper from charging its regular commercial rates for publishing such notice as described in your request.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 14, 1939.

Hon. Howard Cooper,
Senator, 18th Senatorial District,
Brent, Alabama.

MOTOR CARRIER ACT—

1. Operator of a motor vehicle, who engages in the business of transporting property for hire for a particular person or particular persons under a special contract or special contracts, is liable for mileage tax on the entire mileage traveled on the trip, even though he might return empty or might transport his own property on such return trip.

2. Person transporting own property offered for sale, sold or to be sold by him, not subject to the provisions of the Act, or the mileage tax levied thereby.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of October 26, 1939, in which you request my opinion as follows:

"Regarding Truck Bill passed in 1932. House Bill 113-Tidwell.

"If a truck carries a load from one point in Alabama to another point in Alabama for hire and pays mileage tax on the one way while loaded should it have to also pay mileage tax on the return while empty? If so, why?

"If a truck carries a load for hire to Birmingham and brings back a load of goods owned by the operator he is liable for mileage tax only on the trip to Birmingham and not on the return load. Therefore, why wouldn't he be exempt if he returned empty for he certainly would not be operating for hire? Furthermore, how many pounds of his own goods would he have to bring back for himself to be exempt from paying mileage tax on the return trip?

"Section 4 of this same Act states that 'any person, firm, association or corporation when transporting only property offered for sale, sold or to be sold by him,' is exempt. Therefore, when cattle are hauled to market and other like goods to be sold would he not then be exempt from compliance with this 1932 Act? If not, why not?"

The Act pertinent to your inquiries is Act No. 159, H. 113, approved October 28, 1932, General Acts, 1932, page 178, and commonly referred to as the Motor Carrier Act of 1932. Subsection (d) of Section 1 of said Act defines a contract carrier as follows:

"(d) 'Contract Carrier' means any operator of a motor vehicle who engaged in the business of furnishing transportation of persons or property for hire for a particular person or particular persons under a special contact or special contracts, and not for the public. 'Contract carrier' shall not be construed to mean or include: 1. Any farmer, merchant, manufacturer, or any other person, firm, association or corporation who transports only his own property; or 2. A cooperative association when transporting only property belonging to the association, or its members, and when no profit is charged for such transportation; or 3. Any person, firm, association or corporation who does not regularly engage in the transportation business, but occasionally transports persons or the property of others for hire; or 4. Any person, firm, association or corporation when transporting **only** property offered for sale, sold or to be sold by him." (Emphasis supplied)

In considering the question of whether or not a person subject to the provisions of this Act should be charged with the mileage tax levied by Section 22 thereof on the return trip of a pay load where, on such return trip, the truck was empty, the Supreme Court of Alabama, speaking through Mr. Justice Foster, in the case of **Alabama Public Service Commission v. Jones,** 236 Ala. 370, 182 So. 452, said:

"But appellee contends in support of his cross-assignments that he should not be charged with the mileage tax on the return trip of a pay load when on such return the truck is empty. The mileage tax of section 22 of the Act of 1932 is levied (1) on 'passenger vehicles' the amount determined by the seating capacity; and (2) **on 'vehicles transporting property' the amount determined by its rated carrying capacity, as we have described.**

"There was no contention that where the owner operated the truck to transport his own goods, or used for his personal business the tax should be imposed, whether the truck was loaded or empty. But when it is used to transport property for others the trip going and returning according to the mileage was held taxable by the Public Service Commission and the circuit court, though it might have been empty one way on the trip. We agree with that construction. The Act defines the vehicles and classifies them (1) as those who are passenger vehicles and (2) those which transport property. **The mileage tax on neither is dependent upon the question of whether** passengers in the one or **property in the other are throughout the trip transported, but whether the trip is for that purpose in whole or in part."** (Emphasis supplied)

Thus, it can be seen that the criterion for determining the mileage tax due on a trip where the property of another is transported for hire pursuant to a special contract is not whether the property is transported "throughout the trip * * *, but whether the trip is for that purpose in whole or in part."

The premises considered, you are advised that a person who transports the property of another for hire pursuant to a special contract is liable for the mileage tax levied by Section 22 of the Motor Carrier Act of 1932, supra, upon the entire mileage traveled on such trip, regardless of whether he might return empty or might be transporting only his own property on the return trip. Cf. Opinion of the Attorney General to Hon. Hugh White, President, Alabama Public Service Commission, State Capitol, Montgomery, Alabama, under date of March 27, 1933, Biennial Report of Attorney General, 1932-34, page 200.

You next inquire if a person would be exempt from compliance with the provisions of the Motor Carrier Act of 1932 if he hauls cattle or other like goods to market to be sold, and make reference to subdivision 4 of Subsection (d) of Section 1, supra. You are advised that if the cattle or other like goods hauled to market to be sold belong to the person transporting the same, then he would be exempt from compliance with the provisions of the Motor Carrier Act of 1932, pursuant to the provisions of subdivision 4 of Subsection (d) of Section 1, supra, or the provisions of subdivision 1 of Subsection (d) of Section 1, supra. Otherwise, he would not be so exempt, but would have to comply with the provisions of the Motor Carrier Act of 1932 and would be subject to the payment of the mileage tax levied by Section 22 thereof. You will note that the property referred to in subdivision 4 of Subsection (d) of Section 1, supra, is "property offered for sale, sold, or to be sold **by him** (that is, the person transporting the same)." If the person transporting the cattle or other like goods to market to be sold did not own the same, it could not be said that they were "to be sold **by him.**" On the contrary, he would be transporting them to be sold by the owner thereof. Cf. Opinion to Hon. Wm. F. Black, Acting Director, Transportation Bureau, Alabama Public Service Commission, Montgomery, Alabama, under date of July 11, 1935, Biennial Report of Attorney General, 1934-36, page 217.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 14, 1939.

Hon. J. C. Griffin,
Sheriff, Perry County,
Marion, Alabama.

When fee is claimed under Section 4659, Code of Alabama, 1923, as amended by an Act of 1933, Extra Session, page 200, it becomes the duty of the presiding judge to determine who is entitled to same and to make certificate naming person so entitled.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 2, 1939, in which you request my opinion as follows:

"Please furnish me with an opinion construing Section 4659 of the Code of Alabama, 1923, with reference as to who is entitled to the fee provided for in said Section, the facts being as follows:

"The defendant in the case in question was caught at a still, warrant for his arrest was issued as of Nov. 21, 1938. He was arrested by me on Jan. 24, 1939, indicted and convicted for distilling on Oct. 11, 1939. The officers making the raid were: Two Federal Officers, one ABC officer, and one Deputy Sheriff out of the office of Sheriff of Perry County. At the trial the Deputy Sheriff and one Federal Officer testified in behalf of the State. The question is: Who is entitled to the fee provided for in the above Section of the Code? The warrant was issued during the term of my predecessor, but no arrest was made until after I was duly qualified as Sheriff of Perry County. Kindly advise me whether I or my predecessor is entitled to the fee."

The fee about which you inquire is, no doubt, that which is commonly termed "informer's fee."

This fee is provided for under the provisions of Section 4659 of the 1923 Code of Alabama, as amended by Act No. 183, S. B. 112, approved April 20, 1933, (General and Local Acts, 1933, page 200). This section, as amended, is as follows:

"Section 4659. Fifty dollar fee to sheriff charged in bill of costs on conviction.—When any person is convicted of violating the provisions of sections 4656 and 4657, article three, chapter 167, of the criminal code of Alabama, 1923, there shall be charged in the bill of cost a sum of twenty-five dollars, from and after the time that this act becomes effective, and up to the second Tuesday in January, 1935, and after said date the sum of twenty-five dollars, to be allowed the person who furnished the evidence and brought about the conviction of any person or persons for the violation of the said referred to statutes. The person so claiming said respective sum as above specified, shall satisfy the presiding judge that he is the person entitled to same, and shall receive from the judge a certificate to that effect, and such person may be the sheriff of the county, deputy, or any other person furnishing the evidence necessary for conviction. Provided, however, that from and after the second Tuesday in January, 1935, the sum so paid under this section shall be limited to twenty-five dollars. And, provided further, after this act becomes effective, that only one such amount shall be paid under this section for a conviction of any number of persons, more than one, for a violation of either of said referred to sections where the evidence shows that the still, apparatus or appliance, is one and the same."

I call your attention to that part of the above quoted section which provides that the presiding judge is the one who is charged with the duty of determining whether or not a particular person is entitled to the informer's fee.

As I construe the above quoted provision of law, the person who furnishes the evidence which brings about the conviction is the person who is entitled to the informer's fee rather than the party who actually makes the arrest. An opinion of this office is, of course, not in any way controlling on the circuit judge.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 14, 1939.

Hon. R. F. Lyon,
Treasurer, Shelby County,
Columbiana, Alabama.

Shelby County—Fine and Forfeiture Fund—Priority of State Witness claims.

Registered State Witness claims against the Fine and Forfeiture Fund of Shelby County are prior claims to all other claims against such fund.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated November 7, 1939, which follows:

"Will you please advise me, officially, regarding the status of registered claims against the fine and forfeiture fund of this county?

"It has been the practice of this office to follow the general law of 1923, which makes registered claims of State Witnesses preferred over the registerd claims of those of officers. In following this course, it was presumed that an Act of 1933 introduced by Mr. McGraw of this county, was intended to and did repeal any local laws to the contrary. This law by McGraw specifically repeals a local law of 1889, which made mandatory the paying of officers' claims as registered along with those of State Witnesses.

"This practice is now challenged on the grounds that a local law which was enacted in 1889 does NOT allow State witness Claims to be preferred over those of officers' claims and that this law has never been repealed. This law is as follows:

"(No. 479) AN ACT (H. B. 719)

"Sec. 1. . . That from and after the passage of this act, all claims against the fine and forfeiture funds of Elmore and Shelby counties shall be paid in their required order, by the Treasurer of said county.

"Section II, That all laws and parts of laws, so far as they conflict with the provisions of this act, be and the same are hereby repealed.

"Approved Feb. 28, 1889.

"It is claimed that, since 'All claims against the fine and forfeiture funds . . . . shall be paid in their "required order' . . . . and that this being a local act and has NOT been repealed, that officers' claims should now have the same rating as those of State Witnesses.

"It seems to me that the intention of the law referred to was merely to repeal the one enacted a short while before. However, inasmuch as this practice has been challenged, I shall await your opinion."

In my opinion, registered State witness claims against the Fine and Forfeiture Fund of your County are prior claims to those of registered officers' claims.

You quote in the above request an Act of the Legislature approved February 28, 1889. Upon checking the original Act, I find that said Act was in truth and in fact approved February 20, 1889. This Act had the effect of putting all claims against the Fine and Forfeiture Fund of Shelby and Elmore Counties on an equal footing.

Your attention is called to Act No. 20 H. B. 209, approved March 8, 1933, General and Local Acts, Extra Session, 1933, page 8, which reads as follows:

"AN ACT to repeal 'An Act to regulate the fine and forfeiture fund of Elmore and Shelby Counties,' in-so-far as it applies to Shelby County, Alabama, which said local Act was adopted by an Act of the Legislature of Alabama, approved February 20, 1889, and appearing in the Acts of Alabama 1888-89 at page 471.

"Be it enacted by the Legislature of Alabama as follows:

"Section One. That a local Act of the Legislature of Alabama entitled 'An Act to regulate the fine and forfeiture fund of Elmore and Shelby Counties,' approved February 20, 1899, and appearing in Acts of Alabama 1888-89 at page 471, be and the same is hereby repealed, in-so-far as it relates to Shelby County, Alabama.

"Section Two. The purpose of the Legislature in repealing this Act is hereby declared to be to reinstate the general laws of Alabama relating to fines and forfeitures as incorporated in Section 4038 of the Code of Alabama of 1923.

"Section Three. If any section of this Act is unconstitutional, or held to be so, it shall not affect the other provisions not offensive to the Constitution.

"Approved March 8, 1933."

It will be noted in Section One of the above quoted Act that the local act, which Act No. 20, supra, purports to repeal, is referred to as being approved as of **February 20, 1899.** It further appears that the local Act referred to in Act No. 20, supra, appears on page 471 of the Acts of Alabama 1888-89. This reference to the 1888-89 Act is correct and upon checking the Acts of 1888-89, the local Act referred to in Act No. 20, supra, appears on page 471 thereof. It will be further noted that the Act of February 20, 1889, is correctly referred to in the title of Act No. 20, supra. This reference to the approval date of 1889 is clearly a self-correcting typographical error and in my opinion its inclusion in Act No. 20, supra, would in no way affect the validity of said Act. The whole idea of Act No. 20, supra, is to repeal the Act of February 20, 1889, insofar as Shelby County is concerned, and in my opinion it does repeal the Act of February 20, 1889, and the General Law in regard to payments out of the Fine and Forfeiture Fund of Shelby County is reinstated thereby. **Reynolds v. Farbitis,** 233 Ala. 625, 172 So. 889.

Section 4039 of the Code of Alabama, 1923, as amended, reads in pertinent part as follows:

> "4039. Surplus of fund to pay officers.—Whenever there shall be a surplus of the fund arising from fines and forfeitures in the county treasury of any county, over and above the sum required to pay the registered claims of the state witnesses, the county Treasurer of such county must pay the fees of the officers of the court arising from criminal cases * * *."

It clearly appears from the above quoted Code Section that there must be a surplus in the Fine and Forfeiture Fund over and above the amount required to pay all registered State Witnesses' claims, before any officers' fees are payable out of said fund.

The Supreme Court in the case of **Mims, Treasurer v. State ex rel. Stallworth, Sheriff,** 180 Ala. 511, 61 So. 811, in consturing Section 6889 of the Code of 1907, which section was brought forward as Section 4039 of the Code of 1923, speaking through Mr. Justice Somerville, said:

> "The fact of a surplus in the county fine and forfeiture fund over the sum required to pay the claims of state witnesses, out of which the court officers are entitled to fees under section 6889, Code of 1907, must affirmatively appear of record before the treasurer can be required by mandamus to pay such officer's fees."

Your attention is further called to the case of **Stone v. Ames,** 91 Ala. 644, 8 So. 421, in which the Supreme Court said:

> "Under general statutory provisions, the certificates of State witnesses are entitled to priority of payment out of the fund arising from fines and forfeitures, over all other claims which are made charges against it, and any surplus remaining must be applied to the payment of the fees of officers of court; but claims of each class are required to be registered, and are payable, as between themselves, in the order of their registration."

It, therefore, affirmatively appears that all registered state witnesses' claims against the Fine and Forfeiture Fund of your county are prior to all other claims against said fund, and you are so advised.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 14, 1939.

Hon. W. M. Vaughan,
Probate Judge,
Dallas County,
Selma, Alabama.

Counties—Boards of Revenue—Authority to appropriate county funds to compensate employee of A.A.A. for additional and independent services performed for County in the administration of the Agricultural Conservation Program for said County.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated October 26, 1939, which reads as follows:

"Please let me have your opinion on the following facts.

"Mr. Aubrey Allen is Administrative Assistant of the Cotton Adjustment Program here and is paid a salary by the United States Government. On account of his valuable services and our desire to retain him here, the County Board of Revenue augmented his salary by giving him $83.34 per month out of the General Fund of the County.

"The Board of Revenue as well as the people of the County generally appreciate very highly the services of Mr. Allen. He is most efficient and it is our earnest desire to retain him by paying him this additional compensation. There is, however, some doubt as to the legality of this additional appropriation and I have been requested to present the matter to you for your opinion.

"I trust that you can see this as we do and will let me have your reply at your earliest convenience."

On November 3, 1939, in reply to our letter of September 29, 1939, asking for additional facts, you forwarded us a letter written by Mr. Aubrey Allen. This letter sets out in detail the duties performed by Mr. Allen for Dallas County in return for the compensation paid him by the Board of Revenue. The pertinent part of said letter is as follows:

"You are familiar with the fact that **I was formerly employed as Assistant County Agent for Dallas County.** In that capacity, I worked with the farmers for five years, doing largely livestock work. Livestock production was being rapidly developed at that time and has continued to expand. Although I have been transferred from the Extension Service to the Agricultural Adjustment Administration, which deals with only one phase of the farmers' problem, they have continued to call on me for help in their livestock and other problems.

"I am called on almost daily by the farmers for assistance in their farm planning. As County Administrative Assistant it is one of my duties to advise the farmers as to the amount of their Soil Building Allowances under the AAA Program and to help them to collect the maximum benefits.

"In addition to my services with the AAA and outside of those duties, Dallas County requires me, for the compensation paid me by Dallas County, to go over the entire farming operations of the county and assist in a comprehensive program. This was considered necessary in Dallas County by the Court of County Revenues.

"This work is in addition to my duties as the County Administrative Assistant for the AAA."

In my opinion, based upon the facts heretofore set out, your inquiry should be answered in the affirmative. Subsection 23 of Section 6755, Code of Alabama, 1923, as amended by General Acts of 1927, page 57, General Acts of 1931, page 759 and General Acts of 1933, Extra Session, page 201, is as follows:

"23. To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising, and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties."

It will be noted that the above section authorizes the appropriation and expenditure of county funds by the governing body of a county for the purpose of "developing, advertising and promoting **agricultural,** mineral, timber, water, labor, and all other resources of every kind of their respective counties." It, therefore, follows and is my opinion that the above section is express authority for the Board of Revenue of Dallas County, Alabama, to compensate Mr. Allen out of the general fund of the county for the services he performs in the administration of the Agricultural Conservation Program for said county which is in addition to the services required to be performed by him in his official capacity with the AAA. Cf. opinion of this office, Quarterly Report of Attorney General Vol. X, page 132, Biennial Report 1932-34, page 430.

In conclusion, I might say that the fact that Mr. Allen is employed by the Federal Government does not prohibit his employment by Dallas County at the same time. The only inhibitions against a person holding a position with the State and Federal Government at one and the same time are found in Section 280 of the Constitution of Alabama, 1901, and Section 2575(7) of

the Code of Alabama, 1923. However, the position held by Mr. Allen with Dallas County, Alabama, would not constitute an "office of profit" within the meaning of Sections 280 and 2575(7) of the Constitution and Code respectively, supra, and therefore, there are no inhibitions against Mr. Allen being employed by both the Federal Government and Dallas County. See opinion of this office to Mrs. Marie Bankhead Owens, dated October 25, 1939, which is attached hereto and made a part of this opinion.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

November 14, 1939.

Hon. J. F. Davis, Chairman,
Court of County Commissioners,
Covington County,
Andalusia, Alabama.

Court of County Commissioners—Crippled Children—

Court of county commissioners authorized to use money from liquor stores allocated for the purpose of the county department of public welfare to pay for transportation of **indigent** crippled children to hospital.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of October 24, 1939, requesting my opinion as follows:

"Please refer to your opinion found in Biennial Reports 1936-38, page 293, last sentence referring to Acts of 1935, pages 870 and 871, and to your opinion found in the same Biennial Report, page 447.

"Also refer to General Acts 1936-37, page 51, last clause reading as follows: 'ten percent shall be paid into the Treasury of the State to the credit of the sixty-seven Counties of the State, and shall be divided equally among each of said Counties and shall be paid to them to be used **exclusively** for the purposes of Public Health, Old Age Pensions, and for **other purposes** of the County Department of Public Welfare . . .'

"There is at Mobile, Alabama, a Clinic for Crippled Children, organized and operated under General Acts, 1935, pages 870 and 871.

"The Department of Public Welfare in this County, pays into the fund of the State Board of Education all donations, bequests, and subscriptions, and approves **only indigent** Crippled Children for treatment at Mobile.

"There are several opinions issued by your office holding that Counties are authorized for general welfare, to make appropriations for eradication of Bang's Disease, to purchase materials for dipping vats, etc. and it appears that a County for general welfare would be within its authority in making an appropriation to cover necessary transportation expenses of **indigent** Crippled Children when properly approved by the County Department of Public Welfare.

"The members of the Court of County Commissioners are unanimously in favor of making appropriations described in the foregoing, and it will be appreciated if you will advise by return mail, if possible, if a County is authorized to make the appropriations, and if not, please state the exact procedure to procure the necessary transportation expenses."

The particular revenue with which we are concerned in your request is restricted in its use by Section 1 of Act No. 401, H. 886, approved September 15, 1939, which Act supersedes the provisions of Section 9(c) of Act No. 66, H. 44, passed over the Governor's veto on February 2, 1937 (General Acts, Extra Session, 1936-37, page 40). The pertinent part of said section is as follows:

"Section 1. * * * ten percent shall be paid into the treasury of the State to the credit of the sixty seven counties of the State and shall be divided equally among each of said counties, and shall be paid to them to be used by them exclusively for the purposes of Public Health, Old Age Pensions, and for the other purposes of the County Departments of Public Welfare."

For the purposes of our discussion, we are concerned with that part which states "other purposes of the county departments of public welfare." Section 13 of Act No. 332, S. 365, approved August 27, 1935 (General Acts 1935, page 762), as amended by Act No. 103, H. 260, approved March 6, 1939, General Acts 1939, Pamphlet page 126), reads as follows:

"Section 13. * * * All administrative and executive duties and responsibilities of the county departments not inconsistent with the rules and regulations of the State Board shall be performed by the county director subject to the approval of the county board. **These duties and responsibilities shall include relief to persons in need of assistance.** * * *" (Emphasis ours)

By interpolation, we see that the pertinent part of the liquor control act, supra, can be read "for the purpose of the relief to persons in need of assistance." This brings the question up as to whether or not the transportation of indigent crippled children is within the purview of this section.

The case of crippled children is provided for in Act No. 398, H. 829, approved September 9, 1935 (General Acts 1935, page 870). The provisions of this act provide that the Department of Education shall have the authority of administering funds which are to be used for the purpose of treating and caring for crippled children. This act makes no mention of indigent crippled children but is all inclusive. However, a crippled child who is indigent comes not only within the purview of this act, but also with the purview of the general welfare act, supra. The fact of the indigency of the crippled child brings into operation the provisions of both the public welfare act and the

liquor control act, supra, since they are concerned with the relief of persons in need of assistance—indigents. The care of indigent crippled children is an integral function of the Department of Public Welfare. The scope of general welfare is broad and all encompassing. There can be no doubt, in my mind, that the care of indigent crippled children would come within the scope of other purposes of the county department of public welfare.

Our opinion to Hon. M. W. Forman under date of November 10, 1937, found on page 447, Biennial Report of the Attorney General, 1936-38 to which you refer in your inquiry is hereby reaffirmed. It is my belief that this opinion states the correct interpretation of this phase of the law and it is my opinion that the transportation of indigent crippled children to the crippled children's hospital is on all-fours with this opinion, since both are dealing with indigents.

It was the definite intention of the Legislature in the enactment of the crippled children's act to provide for relief for the crippled children of this state. Although this act states that the Department of Education shall have the administration of the funds appropriated for this purpose, it could not be successfully assumed that the intention would be carried out by restricting all aid to crippled children of all kinds, both indigent and otherwise, to the Department of Education. We may look to the object of the enactment against which it was intended to provide for the legislative intent.

Henry v. McCormack Bros. Motor Car Co., 232 Ala. 196, 167 So. 256;

Union Bank & Trust Co. v. Blan, 229 Ala. 180, 155 So. 612;

State v. Griggs, 227 Ala. 681, 151 So. 850.

This we have done and we find the legislative intent to be to help these crippled children and not to make them suffer because of any strict construction of the law. It has been well stated that where a particular construction of a statute will cause great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in our statute. See the numerous cases cited in Alabama Digest, Statutes, Key No. 181(2).

Therefore, it is my conclusion that this care for crippled children is not limited solely to the Department of Education, but those crippled children who are indigent may be cared for by the Department of Public Welfare under their authority to give relief to persons in need of assistance.

The opinion to Hon. J. A. Carnley under date of July 28, 1937, found on page 293, Biennial Report of Attorney General, 1936-38, to which you refer in your inquiry, is to be construed in the light of this extension of the same. The opinion to Judge Carnley is, I believe, correct in saying that the expense of conveying **crippled children** is not a proper claim against the county. This is possibly true, but where the crippled child is also indigent, then he comes within the purview of the welfare act, and as such is entitled to assistance which the County Department of Public Welfare may give him.

It is my opinion, then, that the Court of County Commissioners of Covington County does have the authority to appropriate money received under Section 1 of the liquor control act, supra, to the county department of public welfare for the purpose of transporting indigent crippled children to the hospital at Mobile.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 14, 1939.

Dr. J. N. Baker,
State Health Officer,
Montgomery, Alabama.

Statutes—Constitutionality—

Act No. 366, S. B. 116, approved September 12, 1939, amending Section 1106 of the Code of Alabama, 1923, as previously amended, is valid and without constitutional objections.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 23, 1939, in which you request my opinion as follows:

"With further reference to my letter of October 20, which I am returning herewith, and in acknowledgement of your communication of the 21st inst. relating to the subject embraced in my letter, I beg to give you the following facts: When Section 1106 of the Code of 1923, as amended, was called to the attention of an attorney by one of our county health officers, said attorney expressed the opinion that it was not constitutional. He did not indicate wherein the unconstitutionality of the law might lie. It is likely that he had in mind the portion of Section 1106 dealing with commitment to jail those who refuse to take and continue treatment for venereal disease. It may be that he is of the opinion that the amended law is violative of Section 6 of the constitution.

"Whether other sections might be brought into play, I do not know, but it will be appreciated if your office will give consideration to Section 6 as well as others that might be involved."

The Act to which you refer is Act No. 366, S. B. 116, approved September 12, 1939, which amends Section 1106 of the Code of Alabama, 1923, as previously amended.

After careful consideration, I am of the opinion that the Act does not run counter to any constitutional provision. Certainly, there is nothing wrong with its title, which is as follows:

> "To amend Section 1106 of the Code of Alabama, 1923, as amended by the Legislature of 1927, relating to the control of venereal disease."

It was held in the case of **McCoy v. Jefferson County,** 232 Ala. 651, 169 So. 304, that "a code section may be amended by reference to the number thereof, when the amended matter is germane and supplemental to, suggested by, and cognate with, the general matter and the subject of the original section." See also the case of **Wilkinson v. Ketler,** 59 Ala. 306.

It might be contended that a person may be committed to jail under this act without being charged with a criminal offense, and, therefore, be deprived of his liberty without due process of law, in contravention of Section 6 of the Constitution of Alabama, 1901. However, this contention is without merit, as under the police power, the State has the right, and it is its duty, to protect its citizens from any and all dangerous, infectious and contagious diseases. If this were not true, then our quarantine laws would be of no avail. This act is, in its last analysis, nothing more nor less than a quarantine measure.

Article 6 of Chapter 31, Sections 1202-1222 of the Code of Alabama, 1928, (Michie), both inclusive, contains the general set-up as to our quarantine laws. The Governor of the State is given the power, under Section 1204 of said Article, whenever he deems it necessary, or whenever he is so advised by the State Board of Health, to declare and proclaim quarantine. Section 1207 thereof provides for detention grounds where all persons coming from quarantined territory may be detained until all danger to the general public has passed.

In this connection I call your attention to the case of **Dowling, Health Officer v. Harden,** 18 Ala. App. 63, 88 So. 217. In that case the petitioner, who was being held as a venereal disease suspect, was seeking to be relieved from custody through a writ of habeas corpus. The petitioner was being detained by the county health officer for the reason stated above. The circuit court, on hearing the petition, granted the writ and discharged the petitioner. The State appealed, and the Court of Appeals, in reversing the lower court, had this to say:

> "The right of the Legislature, under the police power to establish quarantine, to prevent the spread of contagion and infection, is too well established by adjudication and grounded in common sense to be questioned or doubted, and governmental agencies, when authorized, may enact and enforce all reasonable ordinances necessary to attain the desired results. To that end, persons affected or reasonably suspected of being affected with diseases known to be infectious or contagious may be segregated, or isolated from the public, either in their homes, or in hospitals or camps prepared for that purpose, until such time as that they will cease to be a menace to the public."

See also the following: **State ex rel McBride v. Superior Court of King County,** 174 P. 973; **Dowling, Health Officer v. Glass,** 18 Ala. App. 65, 88 So. 218.

Of course, the place of detention must be such as is designated by law, otherwise the detention would be illegal. Under the act here in question, where persons are infected with venereal diseases and refuse to take treatment for same, the statute designates the jail as the place where such persons may be committed, not as criminals, but as persons having an infectious or contagious venereal disease who refuse to take treatment for same, and kept for treatment until no longer a source of danger to the public health.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 14, 1939.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Taxation—Sales Tax—National Banks—

The proceeds of sales at retail to national banks held not subject to sales tax levied by Alabama Sales Tax Act (Act No. 18, Pamphlet Acts, 1939, p. 16).

Use Tax—National Banks—

Purchases at retail by national banks not subject to Use Tax Act (Act No. 67, Pamphlet Acts. 1939, p. 96).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of October 28, 1939, in which you request my opinion as follows:

"Will you kindly give me your opinion as to whether or not the gross proceeds of sales at retail to National Banks within the State of Alabama are subject to use as a measure of the sales tax levied by the Alabama Sales Tax Act (House Bill 82 approved February 8, 1939). I am familiar with the opinion rendered May 8, 1938, found in the Biennial Reports of the Attorney General for 1936-38, page 207.

"In this same connection, will you please give me your opinion as to whether or not purchases at retail by National Banks, where the aforementioned sales tax has not been paid, are subject to the provisions of House Bill 83 (Use Tax Act), approved February 28, 1939."

In my opinion, the gross proceeds of sales at retail to national banks within the State of Alabama are not subject to the Alabama Sales Tax Act (Act No. 18, H. B. 32, approved February 8, 1939, General Acts, 1939, Pamphlet Edition, p. 16) nor are purchases at retail by national banks where sales tax has not been paid subject to the provisions of the Use Tax Act (Act No. 67, H. B. 83, approved February 28, 1939, General Acts, 1939, Pamphlet Edition, p. 96).

It may be assumed that national banks are instrumentalities of the United States Government as contemplated by **McCollough v. Maryland,** 4 Wheat. 316, and cases following it (See **Davis v. Elmira Savings Bank,** 161 U. S. 275; **First National Bank v. Anderson,** 269 U. S. 341, 347) and, as such, are not subject to tax by the State except with the consent of and in the manner prescribed by Congress (See Section 5219, Revised Statutes; 12 U. S. Code, Ann., Section 548).

The immunity of the Federal Government from taxation by the State was created out of the necessity for preserving the independence of the dual system of government under our constitutional system. As stated in **Metcalf & Eddy v. Mitchell,** 269 U. S. 514, 523:

> "Its origin was due to the essential requirement of our constitutional system that the Federal Government must exercise its authority within the territorial limits of the States, and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere must be left free from undue influence by the other."

It is true that there has been omitted from the provisions of the 1939 Sales Tax Act the provisions contained in the 1937 Luxury Tax Act exempting the gross receipts from sales of tangible personal property to the United States Government or instrumentalities thereof but, even the omission of such exemption cannot give the State the right to impose a direct tax on an instrumentality of the Federal Government where the effect of such tax is so direct as to constitute it a substantial, as distinguished from an indirect and remote, interference with the exercise of the governmental functions delegated to the Federal instrumentality. **Long v. Roberts & Son,** 234 Ala. 570, 176 So. 213, 218.

Nor can the provisions of Act No. 65, approved March 2, 1939, providing that property and activities of the United States and its agencies shall be taxable in certain instances, operate pro tanto to require payment of such taxes. (Cf. Opinion to Roy Johnson, Tax Assessor, Jefferson County, under date of October 19, 1939.)

The question is thus presented as to whether or not the tax levied by the 1939 Sales Tax Act is such a direct imposition upon the consumer, the national bank, as to cause its levy to be an unconstitutional interference with a governmental enterprise.

While this office is fully aware of the decision of the Supreme Court of Alabama in the case of **Doby v. State Tax Commission,** 234 Ala. 150, 174 So. 233, wherein it is intimated that the tax levied by the Alabama Luxury Tax Act was a tax upon the retailer rather than the consumer, we note that in more recent cases it has been denominated in effect a "consumer's tax" in the sense that it is required to be passed on to, and collected from, the pur-

chaser. **Lone Star Cement Co. v. State Tax Commission,** 234 Ala. 465, 175 So. 399; **National Linen Service Corp. v. State Tax Commission,** 237 Ala. 360, 286 So. 479.

In **Lone Star Cement Co. v. State Tax Commission,** supra, in considering the same tax act as that considered in the Doby case, supra, the Supreme Court of Alabama, speaking through Mr. Justice Brown, stated:

> "The purchasers in these classes are the ultimate consumers and the legislative intent is to make the sale to the consumer the basis for computing the tax. **State vs. Christhilf,** 170 Md. 586; 185 A. 456. **In truth and in fact the tax can well be denominated a consumer's tax.** See Section 26." (Emphasis supplied)

Again, in **National Linen Service Corp. v. State Tax Commission,** supra, the Supreme Court says:

> **"The consumer is the final burden bearer. In that sense the tax is a consumer's tax. Doby vs State Tax Commission,** 234 Ala. 150, 174 So. 233; **Lone Star Cement Corp. v. State Tax Commission,** 234 Ala. 465, 175 So. 399, 402. * * * The tax is levied on precisely the same business activity, so far as the consumer is concerned, as if the property was purchased from a local retail dealer. **The consumer is the last person to whom property passes in the course of ownership. This is the test of a retail transaction.** This tax is at the same rate, measured by substantially the same standard, and **paid by the same party that actually bears the tax burden in local retail sales. * * * The only substantial difference is that under Section 2(d) the consumer pays the tax directly to the State, while in local retail transactions he pays through the retail dealer, and the license provisions of the act do not apply to consumers."** (Emphasis supplied)

Since the 1939 Sales Tax Act is identical in legal effect with the 1937 Luxury Tax Act in so far as the character of the tax levied is concerned, the above holdings are equally applicable to it.

It being true, therefore, that the actual burden of the Alabama Sales Tax is upon the consumer, the requirement that the tax be collected by the retailer on the gross proceeds of sales to national banks would, in my judgment, constitute an unwarranted interference with, or burden upon, the Federal Government.

This conclusion is further strengthened by reference to the case of **Panhandle Oil Co. v. Mississippi ex rel Knox,** 277 U. S. 218, which case was followed by the Supreme Court of the United States in its subsequent decisions in the cases of **Indian Motorcycle Co. v. United States,** 283 U. S. 570, and **Graves v. Texas Company,** 298 U. S. 293. In the Panhandle case, the court was called upon to determine whether an excise tax imposed by the State of Mississippi on dealers for the privilege of selling gasoline in that State and collected only from the dealer making the sale could be applied to sales to the United States for the use of its coastguard fleet and its veteran's hospital. The ruling was that the tax could not be so applied consistently with the constitutional principle which was involved. The court held that while a State may impose a tax on a dealer "for the privilege of carrying on trade

that is subject to the power of the State" it may not lay any tax "upon transactions by which the United States secures the things desired for its governmental purposes," and further that:

> "* * * It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests * * * To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. And that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the State."

The theory adopted by the Supreme Court in the Panhandle case appears to have been that the tax imposed by the Mississippi statute was in effect upon the actual sale or transaction in which the Government was a participant and that the tax therefor was an unconstitutional burden upon the United States.

I am not unaware of the recent decision of the Supreme Court of California treating a similar question in the case of **Western Lithographing Co. v. State Board of Equalization,** 78 P. (2) 731. It was there held that the tax imposed on the retailer under the California Retail Sales Tax Act on the basis of receipts from sales of tangible personalty to national banks was not invalid as unduly burdening the Federal Government or interfering with the exercise of governmental functions delegated to its instrumentality. However, your attention is called to the fact that the California Supreme Court in that case based its conclusion upon the premise that:

> "The tax being a direct obligation of the retailer and, so far as the consumer is concerned nothing else, **it is neither in truth nor in fact laid upon the consumer.** It does not become a tax on the sale nor because of the sale, but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales."

The opinion of the California Supreme Court therefore becomes at once understandable and easily distinguished from the present situation. As noted, there the tax was held by the Supreme Court of California to be an obligation of the retailer and not a burden upon the consumer, while as has been shown, the Supreme Court of Alabama has treated the Alabama Sales Tax as a consumer's tax.

Since, as stated above, the Alabama Sales Tax is in truth and in fact a consumer's tax, and since the Panhandle case, supra, and the other sales tax cases above cited do not appear to have been ovverruled by any decision of the Supreme Court of the United States, and in the absence of any congressional enactment providing for the payment of the tax by national banks, I am constrained to hold that the sales tax should not be collected upon the gross proceeds of sales at retail to national banks. (Biennial Report of Attorney General, 1936-38, page 207).

The conclusion is the same with respect to the collection of the use tax on purchases at retail by national banks. The tax levied by the Use Tax Act is "on the storage, use or other consumption in this State of tangible personal property purchased at retail" (See Section 2 of Act No. 67, approved February 28, 1939, Pamphlet Acts, 1939, pages 96, 98). There can be no doubt

that the use tax, an excise tax levied on certain of the privileges of ownership, is a direct burden on the consumer. **National Linen Supply Co. v. State Tax Commission,** 186 So. 479; **Douglas Aircraft Co., Inc. v. Johnson,** 90 P. (2) 572.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 15, 1939.

Dr. W. A. Wood, Secretary-Treasurer,
Board of Dental Examiners of Alabama,
Mobile, Alabama.

Dentistry—

Newspapers do not violate the laws of this state by carrying dental advertisements.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of October 23, 1939, in which you request my opinion as follows:

> "As you know, we have a law against advertising by dentists in this State. I would like to know if the law is being violated by newspapers in the state who carry dental advertising of firms outside the state. I have in mind the Southern Farmer, published in Montgomery."

From a careful examination of the statutes of this State relating to the practice of dentistry and newspaper advertising, I find no provision of law which makes it unlawful for a newspaper to carry an advertisement inserted by a resident or nonresident dentist.

I call your attention to the fact that in certain instances it is legal for a dentist in this State to insert an advertisement in a newspaper. See Section 333, Code of Alabama, 1923, as amended.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 15, 1939.

Court of County Commissioners,
Fayette County,
Fayette, Alabama.

Sales Tax Monies—Expenditures thereof—

Proceeds going to the county from Sales Tax may be used for the construction of buildings to be used by the Public Health Department, Public Welfare Department and the Agricultural Extension Service in cooperation with these State agencies and/or the Federal Government.

Opinion by Assistant Attorney General McCall.

Dear Sirs:

I have your letter of September 26, 1939, in which you request my opinion as follows:

"The Court of County Commissioners of Fayette County have been requested to ask your opinion on the following expenditures from the sales tax revenues:

"(1) In Hankins Precinct in this County there is no public assembly place. It is desired to expend from said fund $250.00 to buy the necessary material for constructing a building to cost about said amount, with the understanding the neighborhood will do the work. This building would be used by the 4-H Club, County Home Club, for meetings for Cotton Program and also for a voting place. There being no available building or shelter therefor. In your opinion, can this be legally expended for said purposes under the theory of an aid to agriculture and its promotion? The land on which the building is located would be deeded to the County.

"(2) A County Fair to aid and promote agriculture has been planned for this county to be held this coming October. This is to be a non-profit agricultural enterprise, and is being sponsored, among others, by the local Exchange Club. It is desired to co-operate in this business by the County Commissioners for the County to the extent of $200.00. Can this legally be done with funds from the sales tax, in aid of agriculture?"

Answering your inquiry, I call your attention to Act No. 18, S. B. 13, approved January 26, 1937, (General Acts, 1936-37, p. 15) which reads in pertinent part as follows:

"Section 1. That in order to aid in diffusing among the people of Alabama in the several counties useful and practical information on subjects relating to agriculture and home economics; to provide for the continuance and improvement of farm and home demonstration work, to provide for the training of men and women leaders, to provide for organizing clubs of farm people, including men, women, boys and girls, for the improvement of agriculture and farm home life; to promote the

welfare of the rural districts by other forms of extension work in Agriculture and Home Economics, and to aid in securing for expenditure in Alabama the full amounts of Federal funds appropriated conditionally to Alabama by the Congress of the United States, under an Act approved May 8, 1914, and generally known as the Smith-Lever Act for Extension Work in Agriculture and Home Economics, and other supplementary and related acts for Extension Work in Agriculture and home economics, there is hereby appropriated to the Alabama Polytechnic Institute, for the fiscal year beginning October 1, 1936, and for each and every fiscal year thereafter, the sum of two hundred and twenty thousand dollars ($220,000.00), and the same shall be paid from and after January 1, 1937, out of the Alabama Special Educational Trust Fund, subject to the terms, conditions, provisions and limitations of the Budget and Financial Control Act, and the General Fund shall be relieved from any payment of said appropriations from and after January 1, 1936; provided, however, that not more than said sum of $220,000.00 so appropriated shall be paid in the aggregate from said General Fund and said Alabama Special Educational Trust Fund, for the fiscal year beginning October 1, 1936."

Your attention is further called to Act No. 323, H. B. 862, approved September 2, 1935, (General Acts, 1935, p. 750), which provides in part as follows:

"Section II. That the funds appropriated by this Act shall be expended under the general direction of the Board of Trustees of the Alabama Polytechnic Institute, through its Extension Service, for paying any and all bills and other items in carrying out the aims and purposes of this act and in such manner as to aid in securing for Extension Work in Alabama in any year the maximum amounts of all Federal funds conditionally appropriated for that year by an Act of the Congress of the United States approved May 8, 1914, and generally known as the Smith-Lever Act for Extension work in Agriculture and home economics, and other Federal Acts supplementary and related thereto."

Act No. 18, H. 82, approved February 8, 1939, (General Acts, 1939, Pamphlet, page 16), commonly called the "Sales Tax Act," in Section XXXV, reads in pertinent part as follows:

" * * * Provided that the funds divided and distributed to the several counties of the State, as hereinabove provided for, shall be used exclusively for full-time health service in cooperation with the State Board of Health and/or the Federal Government; for public welfare in cooperation with the State Department of Public Welfare and/or the Federal Government; and for extension service in cooperation with the Alabama Agricultural Extension Service and/or the Federal Government, at the discretion of the commissioners court, board of revenue or other governing bodies of the several counties of the State."

An opinion of this office of June 30, 1939, rendered to Hon. J. R. Copeland, Judge of Probate, Blount County, (Quarterly Report of Attorney General, Vol. XIII, page 343), answers part of your inquiry. This opinion after setting out Section XXXV of the Sales Tax Act of 1939, supra, held as follows:

"From the verbage of the above quoted section it appears that the funds designated therein are to be used exclusively for health service, public welfare, and agricultural extension service. The carrying on of the work of these State agencies is the sole use to which this money may be put. Quarterly Report of Attorney General, Vol. VII, page 71."

"Therefore, we are confronted with the question of whether or not an office building to house the agencies set out in the Act is within the purview of 'carrying on' the work of these agencies. This office has held that the proceeds here under consideration may be used in cooperation with the Department of Public Welfare and State Board of Health in the following projects: To defray expenses incurred for the burial of paupers, for registration of births and deaths, maintaining a charity ward in a hospital, maintaining a tuberculosis preventorium and to pay the salary of a nurse used in the rest room of the courthouse. Quarterly Report of Attorney General, Vol. VIII, page 5; Quarterly Report of Attorney General, Vol. VIII, page 105. More apropos is an opinion to Hon. W. H. Lindsey, Quarterly Report of Attorney General, Vol. VIII, p. 119, which held that the proceeds of the Sales Tax could be used to pay the rent on rooms used by the county health unit.

"These opinions, then, indicate that office rent is within the meaning of the statute in that it is in promulgation of the work of the various State agencies with which we are concerned. Moreover, this office has repeatedly held that office rent is within the purview of statutes similar to the one here under consideration.

"Biennial Report of Attorney General, 1932-34, page 594; Biennial Report of Attorney General, 1932-34, page 629; Quarterly Report of Attorney General, Vol. IX, page 93."

"Premises considered, it is my opinion that the constructing of the building in question is a proper use of Sales Tax monies.

"However, we are now faced with the second part of this problem, i. e., what procedure must be followed in using the money in question. It will be noted that the Sales Tax Act says 'in cooperation with.' All of the various uses to which this money has been put as set out in the citations above have been in cooperation with one or another of the State agencies set out in the Act itself. The words, 'in cooperation with,' have been construed by the Supreme Court of Alabama in the case of **Tuscaloosa County v. Walker,** 235 Ala. 293, 178 So. 543. The words of Justice Gardner in the above cited case are aptly put and give us a clear conception of the attitude of our Supreme Court in regard to the expenditure of the Sales Tax money. I quote below the pertinent part of Justice Gardner's opinion.

" 'Clearly, therefore, when the Legislature, in Section 21, supra, speaks of expenditure of these funds in cooperation with the county authority, it was not meant that the latter could exercise its own discretion as to the wisdom of such expenditure, and its own judgment as to what in fact was embraced within the influence of the activities of these various governmental agencies. We think the discretion referred to as resting in the county authority was the ascertainment of the purpose or purposes for which the funds were to be expended.

" 'Thus the county maintains its own initiative and autonomy in determining the purpose or purposes for which the money is to be expended. But we think it equally clear that it was the legislative intent that these State agencies were to exercise their judgment as to whether or not the expenditures were within the meaning of the terms "public health," "public welfare," and "agricultural extension service." '

"From a reading of the opinion of the Supreme Court, it will be seen that the court of county commissioners, board of revenue or other like governing body of the county may determine the purposes for which the money in question is to be expended with the limitation that the purpose or purposes must come within the limits set out in the act, and further that the determination of whether or not the purpose is within the cognizance of the Act, be left up to the State agency concerned therewith.

"Therefore, it is my opinion that if the project proposed in your county is approved by the appropriate State agency, your court of Commissioners may appropriate money received by your county from the Sales Tax to promulgate this project."

It is my information that the Alabama Agricultural Extension Service supervises the work and controls the activity of the 4-H Clubs, County Home Clubs, and the Cotton Program.

In view of the above, it is my opinion that the County Commissioners have authority to propose that the county's share from the receipts of the sales tax be used for the purposes mentioned in paragraphs (1) and (2) of your inquiry and if these projects are approved by the Alabama Agricultural Extension Service, your County Commissioners may appropriate money received by your county from the sales tax to promulgate the projects.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 15, 1939.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

The library charge which attaches in every case that goes upon the docket of the various courts of Jefferson County under Local Act No. 462, H. 833, approved September 15, 1939, has preference in payment out of any money collected on a judgment, except the trial tax imposed by the State on every case that goes upon the docket of the circuit court.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 5, 1939, requesting my opinion as follows:

" Please refer to your ruling of June 16, 1939, addressed to Hon. E. C. Torbert, Register, Hale County, Greensboro, Alabama, and particularly to that part of the ruling dealing with proration of the State Trial Tax; and also please refer to House Bill 833, by Mr. Welch, approved September 15, 1939, and particularly to that portion which reads as follows:

'- - - and when any part of the costs in a case has been paid, the amount necessary for the payment of said fee shall be applied thereto before applying any of the amount paid as costs to any other item of costs.'

"In view of the provision quoted above in House Bill 833, please advise me in answer to the following:

"Would not the General Law pertaining to the State Trial Tax Fee of $3.00 take precedence over that part of House Bill 833, which places the Jefferson County 'Law Library Fee' ahead of any amount of costs collected?"

Under a Local Act for Jefferson County, Act No. 462, H. 833, approved September 15, 1939 (Welch), which act levies a charge on each suit or cause filed in the various courts of Jefferson County, the proceeds to be used in establishing or maintaining a law library for Jefferson County, the charge is designated **"as costs"** all the way through the act.

This office has repeatedly held that the trial tax imposed by the State on cases, civil and criminal, that go upon the dockets of the circuit courts is a revenue measure or revenue tax, and that it must be paid out of any money collected on a judgment and cannot be prorated.—**Quarterly Report of Attorney General, Vol. XV, page 301; Opinion of the Attorney General to Circuit Judge of Seventh Judicial Circuit on October 6, 1939** (copy enclosed).

In this connection, I call your attention to the case of **State ex rel Franklin County v. Hester,** 224 Ala. 460, 140 So. 744. It is true that this case is not exactly in point, but the opinion of the court intimates very strongly that the law providing for trial tax is a revenue measure.

Therefore, in the light of what is said above, I am of the opinion that this library charge is "costs" and that the trial tax imposed in every case that goes upon the docket of the circuit court is a part of the State revenue. Therefore, under the holding of this office in the opinion in Vol. XV, Quarterly Report of Attorney General, page 301, supra, I am of the opinion that the State trial tax has priority over this library charge since it is part of the State revenue, whereas the library charge is costs, though under the act, supra, the library charge has priority over all other items of costs.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 16, 1939.

Hon. R. K. Greene,
Judge of Probate,
Hale County,
Greensboro, Ala.

Tax Sales—Right of Redemption (General Acts 1933, Extra Session, P. 74).

Owner of land sold for taxes may redeem through an agent. Probate Judge should ascertain alleged agent's authority.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of October 28, 1939, requesting official opinion. Your letter follows:

"The purpose of this letter is to inquire as to the rights of parties redeeming land sold for taxes.

"The situation is this: The land was sold as the land of John Doe. Before the redemption period was up Richard Roe presents to me all moneys necessary to redeem the land, states that he is acting as the agent of John Doe and wishes to have the land redeemed as the land of John Doe, the party owning it when it was sold and who still owns it subject to the tax sale. The purchaser at the tax sale objects to Richard Roe's undertaking to redeem the land for John Doe on the ground that Richard Roe has no proof that he is the agent of John Doe, that the statute must be strictly followed with reference to redemption and that no party should be allowed to redeem for the owner unless he presents a written authority.

"In such a case may Richard Roe redeem the land without such written authority?"

Section 268 of Act No. 194, H. B. 324, approved July 10, 1935, General Acts, 1935, pages 256-368 (General Revenue Act of 1935), makes provision for certain persons to be able to redeem land sold at tax sales.

Said section is as follows:

"Section 268. Real estate which hereafter may be sold for taxes and purchased by the State may be redeemed at any time before the title passes out of the State, or if purchased by any other purchaser, may be redeemed at any time within three years from the date of the sale by the owner, his heirs or personal representatives, or by any mortgagee or purchaser of such lands, or any part thereof, or by any person having an interest therein, or in any part thereof, legal or equitable, in severalty or as tenant in common, including a judgment creditor, or other creditor having a lien thereon, or on any part thereof; and an infant or insane person entitled to redeem at any time before the expiration of three years from the sale, may redeem at any time within one year after the removal of his disability; and such redemption may be of any part of the lands so sold, which includes the whole of the interest of the redemptioner. If the mortgage or other instrument creating a lien under which a party seeks to redeem is duly recorded at the time of said tax sale, the said party shall, in addition to the time herein specified, have the right to redeem said real estate sold, or any portion thereof covered by his mortgage or lien, at any time within one year from the date of written notice from the purchaser of his purchase of said lands at tax sale, served upon such

party, and notice served upon either the original mortgagee or lien holder or their transferee of record, or their heirs, personal representatives or assigns, shall be sufficient notice."

I am of the opinion that an owner of real estate which has been sold at a tax sale may redeem his lands through the medium of a duly authorized agent.

I am of the opinion, however, that it would be to your advantage to investigate to determine whether or not the person who represents himself to be the agent of such a landowner is in fact his agent. The general rule is that every person who undertakes to deal with an alleged agent is by the mere fact of his agency put upon inquiry and must discover at his peril that such agency in its nature and extent is sufficient to permit the agent to do the proposed act, and that its source can be traced to the will of the alleged principal. The person dealing with the agent should ascertain the extent of his authority from the principal or from some other person who would have a motive to tell the truth in the interest of the principal and he should not rely solely upon the agent's statement or assumption of authority. **2 Corpus Juris 562, 563.**

Under the facts stated in your letter, it is difficult to assume a situation where the owner could be injured by your allowing another person to redeem for him, but nevertheless I believe that the safe policy would be for you to ascertain whether or not the alleged agent is in fact a representative of the owner.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 16, 1939.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

Filing Tax—The consideration recited in an instrument conveying property or an interest therein is presumed to be the true consideration for the conveyance and to show the value of the property or interest conveyed.

Upon offer of such instrument for record, in the absence of notice or knowledge to the contrary, the Probate Judge may assume the consideration so recited to be the value of the property or interest conveyed in fixing the filing tax for record of the instrument (General Acts, 1935, page 256, Section 348, Schedule 46, pages 456-7).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion dated November 3, 1939, which follows:

"I enclose you herein a copy of an instrument which has been presented for recording by this office.

"You will observe it is a transfer by Reconstruction Finance Corporation of a note and mortgage that were executed to that corporation in 1935, and which was then recorded, without payment of any mortgage record tax, as mortgages made to that Corporation are exempt from such tax.

"My inquiry to you is how am I to proceed to ascertain the amount of record privilege tax payable on this instrument under Schedule 46 of the License Laws (Simon's Compilation, page 235); and on what amount, or how I am to arrive at the amount, on which such record privilege tax should be based?

"You will note that the instrument now submitted to you recites that the grantee pays to assignor $936.44 for this assignment or transfer. It would seem a reasonable presumption that said $936.44 is all that was still owing under the mortgage at the date of this transfer and is all the value that the grantee or assignee gets by this instrument; therefore, said amount is the proper basis on which to assess the deed filing tax under said Schedule 46. However, the case is not without its complications, under the language of said schedule; hence I am asking your opinion for my guidance."

The recording of the assignment or transfer of the mortgage, upon which no mortgage tax had been paid, is subject to a deed tax as provided for by Schedule 46 of Section 348 of the Revenue Act of 1935.—Quarterly Report of Attorney General, Vol. XV, page 229. The amount of the tax is based on the value conveyed by the assignment or transfer.

I am of the opinion that the consideration recited in the instrument, of which you have submitted a copy, should, in the absence of notice or knowledge on your part to the contrary, be taken as the value of the interest conveyed in fixing the filing tax for record of said instrument.

The recital of a consideration in any instrument conveying property or an interest therein is prima facie proof of the payment of a valuable consideration and if the consideration is expressed in dollars, the amount so expressed will be presumed to be the agreed value of the property or interest and to be the actual consideration until and unless rebutted by evidence to the contrary.

In the absence of such evidence, the expressed consideration will be held to be the true and only one, but it may always be inquired into. **Harraway v. Harraway et al.,** 136 Ala. 499, 34 So. 836 (1902); 18 C. J. 265-6; **Long, Judge v. Jasper Land Co.,** 217 Ala. 593, 117 So. 210; **Thompson, Probate Judge v. Smith,** 27 Ala. App. 460, 174 So. 796. See also Quarterly Report of the Attorney General, Vol. XIV, p. 139.

I am returning herewith copy of the assignment enclosed in your letter.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 16, 1939.

Hon. J. E. McAdory,
Deputy Tax Assessor,
Jefferson County,
Bessemer Division,
Bessemer, Alabama.

MUNICIPAL TAXATION—Section 201 of the Revenue Code of 1935, as amended by Act No. 57, H. B. 183, approved February 27, 1939, (General Acts of 1939, page 67, Pamphlet form)—

Municipality, desiring to use county machinery for assessing, equalizing and collecting its taxes, must pass proper ordinance in May and deliver certified copy of same to Tax Assessor on or before June 1 in order to place the duty of assessing, equalizing and collecting taxes for the following year on the county officials.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of October 24, 1939, in which you request my opinion as follows:

"I respectfully request an official opinion in regard to the legality of assessment and collection of taxes for the City of Pleasant Grove for the tax year 1940.

"Enclosed is a copy of a letter to the Honorable Roy Johnson, also Ordinances Numbers Eight and Nine of the Town of Pleasant Grove."

The letter to Mr. Roy Johnson, referred to in your request reads as follows:

"Mr. Roy Johnson,
Tax Assessor of Jefferson County,
Bessemer, Alabama.

Attention: Mr. J. E. McAdory, Deputy Tax Assessor.

"Dear Sir:

"I hand you herewith a certified copy of an Ordinance adopted by the Town Council of the Town of Pleasant Grove on October 16, 1939,

providing for the assessment, equalization and collection of taxes due the Town of Pleasant Grove by the officers and boards provided for in Chapter 58 of the Code of 1923. This Ordinance has been adopted pursuant to authority of Section 3095 of the Code of 1923 and Section 201 of the Revenue Code of 1935.

"I also hand you herewith a certified copy of an Ordinance adopted by the Town Council of the Town of Pleasant Grove on October 16, 1939, levying taxes for the current tax year, which year begins October 1, 1939, and ends September 30, 1940, at the rate of 50c on each $100.00 in value on property and other subjects of taxation situated within the Town of Pleasant Grove.

"We are advised that in Alabama municipal taxes are collected in advance whereas State and County taxes are collected at the end of the tax year, so that each fall State, County and City taxes are all paid on the same valuation, the Legislature having provided that City taxes so paid shall be in advance in order to comply with Section 216 of the Constitution of Alabama which limits the amount of taxes which a municipality may levy to one-half of one per cent of the value of such property as assessed for State taxation during the preceding year.

"Please assess the taxes for the Town of Pleasant Grove for the current tax year on your books and such taxes being now due, and please have the County Tax Collector collect such taxes for the Town."

It is my opinion that the County Tax Assessor of Jefferson County is under no duty to assess, nor the Tax Collector to collect the 1939-40 taxes for the municipality of Pleasant Grove.

Article 31 of Chapter 43 of the 1923 Code of Alabama, being Sections 2124 through 2152, provides for the collection of municipal taxes by a municipality. Section 2124 provides that after the first day of October, municipalities may levy their taxes, etc. and Section 2125 provides that the taxes shall become due on December 1 and delinquent on January 1. This, however, is the system provided for those municipalities that collect their own taxes.

Section 201 of the 1935 Revenue Code, as amended by Act No. 57, H. B. 183, approved February 27, 1939, and found on page 67 of the General Acts of 1939, pamphlet form, provides for a different system for the assessment, equalization, and collection of municipal taxes. Opinion rendered to Hon. J. Collier Merrill, Tax Collector, Covington County, Andalusia, Alabama, May 27, 1939, Quarterly Report of Attorney General, Vol. XV, page 231.

Section 201 of the 1935 Revenue Code, as amended, supra, is as follows:

"Section 201. Any municipal corporation in this State, may, by ordinance duly adopted, provide for the assessment, equalization and collection of taxes due such municipality, by the officers and boards provided in this Chapter, and all the machinery herein provided for the assessment, equalization and collection of State and county taxes, the enforcement of such collection, the sale of property for the collection of taxes and the redemption from such sales, shall be applicable to the assessment and collection of such municipal taxes, the sale of property for the collection of such municipal taxes and the redemption from such sales, and the assessor and collector shall receive such compensation as

may be fixed by the governing body of such municipality, not to exceed one half of one per cent for assessing and one-half of one per cent for collection, and if any municipal corporation has heretofore availed itself of the provisions of this section or shall hereafter do so by the adoption of an ordinance as provided for herein, **there shall also be applicable to the assessment and collection of its taxes, the sale of property thereof, and the redemption from such sales, all such other machinery, procedure and provisions of law as are now applicable with respect to the assessment, levy and collection of municipal taxes of cities having a population of not less than 6500 nor more than 15,000 according to the last or any subsequent Federal Census.** And such machinery, procedure and provisions shall apply to all uncollected taxes whether heretofore or hereafter assessed, provided the municipal corporation has heretofore adopted such ordinance." (Emphasis supplied)

You will note that the underscored portion of the above quoted section provides that all such other machinery etc. which is now applicable to cities having a population of not less than 6500 nor more than 15,000 shall be applicable to all cities availing themselves of the provisions of this Act. Therefore, I call your attention to Act No. 300, H. B. 864, approved January 26, 1931, (General Acts, 1931, page 337) which provides for the assessment, levy and collection of municipal taxes of cities which have a population of not less than 6500 nor more than 15,000 inhabitants. Section 3 of this Act is as follows:

"Section 3. It shall be the duty of the council, board of commissioners, or other governing body of such cities **during the month of May, 1932,** and hereafter during the **month of May of each year,** by resolution or ordinance, to levy a tax on the property situated in such cities for the next succeeding tax year at a rate in no event in excess of the constitutional limit authorized to be levied by such cities on the value of such property as assessed for State taxation as shown by the books of assessment for the State and County tax year ending the 30th day of September next succeeding the levy. **The levy so made by the council, board of commissioners, or other governing body of such cities shall go into force and effect as of the 1st day of October next succeeding the levy and shall become a lien only on the 1st day of October next succeeding such levy. After such levy is made it shall be the duty of the Mayor or presiding officer or clerk or other clerical officer of such cities on or before the 1st day of June next succeeding the levy to certify and deliver to the Tax Assessor of such County in which such cities are situated a copy of the resolution or ordinance passed** by such city council, board of commissioners or other governing body in and by which taxes are levied for such cities for the next succeeding tax year commencing on the first day of the next succeeding October, provided in case such city council, board of commissioners or other governing body shall fail any year after the year 1932 to make such levy and give such notice then the levy for the preceding year shall be continued and the taxes shall be assessed in accordance with such levy." (Emphasis supplied)

In the situation here presented, the town of Pleasant Grove did not levy its taxes until October 16, 1939. In order for it to have availed itself of the provisions of Section 201 of the 1935 Revenue Code, as amended, supra, for the collection of its 1939-40 tax levy, would have to have been made in May, 1939, and a copy of such ordinance delivered to the County Tax Assessor on or before June 1, 1939. In my opinion, the town of Pleasant Grove, having

failed to make the levy in May and notify the County Tax Assessor of same before June 1, cannot place at this late date the duty of assessing, equalizing and collecting its 1939-40 taxes on the County officials.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 16, 1939.

Hon. M. E. McConnell,
Judge of Probate,
Sumter County,
Livingston, Alabama.

Filing Tax—Upon exchange of two parcels of land by execution of a deed or deeds, the filing tax for recordation thereof is to be computed upon the value of each parcel of land conveyed, and each deed is subject to the tax to be so computed, (Schedule 46 of Section 348 of the 1935 Revenue Act).

The total tax is to be based upon the total value of both parcels of land, if the exchange is effected by a single deed.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion dated November 4, 1939, which follows:

"A deed has been filed in my office in which two parcels of land are being exchanged by two persons. There is no actual consideration in the transaction. A is conveying to B a parcel of land, and B in turn is conveying a parcel of land.

"Please advise me what tax would be due on this instrument."

The transaction above referred to is in effect an exchange of properties, and your conclusion that "there is no actual consideration in the transaction" is not well founded.

The consideration for the conveyance from A to B is the land conveyed by B to A, and the filing tax to be paid for recordation of A's deed to B is to be computed upon the value of the land so conveyed by A to B, which you should ascertain from whatever evidence is available.

Likewise, the consideration for the conveyance from B to A is the land conveyed by A to B, and the filing tax to be paid for recordation of B's deed to A is to be computed upon the value of the lands so conveyed by B to A, to be computed upon the value of the land so conveyed by B to A, to be ascertained from such evidence as is available.

This opinion is based upon the provisions of Schedule 46 of Section 348 of Act No. 194, H. 324, approved July 10, 1935, known as the Revenue Act of 1935, (General Acts, 1935, pages 256, 456), which require the Judge of Probate to "determine the amount of tax" due on all instruments offered for record conveying real or personal property within this State, or any interest therein, with certain exceptions.

For a full discussion of the method of computing the tax due in such a case, please refer to an opinion rendered by this office February 27, 1939, to Hon. John T. Frazer, Judge of Probate, Lee County, Opelika, Alabama, (Quarterly Report of the Attorney General, Vol. XIV, p. 139), which deals with this subject fully.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 16, 1939.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Sheriffs—Feeding Prisoners—

State may legally pay sheriff's feed bill claim for prisoner who was committed to his jail to serve sentence for fine and costs or costs alone, although said sentence is void.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of September 8, 1939, in which you request my opinion as follows:

"Please advise me in answer to the following questions:

"1. If a court sentences a defendant in a criminal case to jail for fine and costs, or, if the fine had been paid, sentences him to jail for the costs, can the State legally pay the Sheriff's Feed Bill claims for feeding the prisoner while he is in jail serving the part of the sentence represented by the costs, or the entire amount where he has been sentenced for costs only?

"2. If your answer to the above is in the negative, would the County be liable for the cost of the prisoner's food?

"I am aware of the fact that there is no provision of law allowing or providing jail sentences on non-payment of costs. According to the law and rulings of your office, if a defendant fails to pay his costs in a misdemeanor case, he must either confess judgment for same or be sentenced to hard labor. With this in mind, it is difficult for me to see how the State could pay for the food of a prisoner serving a sentence if the Judge has sentenced him contrary to the law."

Section 4827, Code of Alabama, 1923, as amended by Act No. 596, H. B. 114, approved September 6, 1927 (General Acts, 1927, page 693), requires the State to pay for the food for prisoners in the county jails. Said section, as amended, is as follows:

"Section 4827. Allowances for feeding prisoners.—Food for prisoners in the county jails, except as otherwise provided by existing laws, shall be paid for by the state as follows; there shall be allowed, such amount as is actually necessary, for food for each prisoner daily, but the said amount so allowed cannot exceed forty-five cents per capita."

Section 4828(1) of Michie's 1936 Supplement to Michie's Code of 1928 (Act No. 203, H. B. 317, approved July 10, 1935, General Acts, 1935, page 595) requires the State to compensate sheriffs in county jails. Said section is as follows:

"Section 4828(1). Allowances for feeding prisoners.—The sheriffs of the several counties of the state shall receive pay for services in preparing food, serving food and other services incident to the feeding of prisoners, not including the cost of food to be served to such prisoners, as follows: For 1 prisoner $1.00 per prisoner per day; for each prisoner from 2 to 5 prisoners 50c per prisoner per day; for each prisoner from 6 to 10 prisoners 40c per prisoner per day; for each prisoner from 11 to 20 prisoners 30c per prisoner per day; for each prisoner from 21 to 85 prisoners .05c per prisoner per day.

"That in all counties where there are two or more jails the report of prisoners in said jails shall be made upon the number of prisoners confined, but the sheriff shall be only paid as if all of said prisoners were confined in one jail."

Section 4830 of the Code of Alabama, 1923, provides as follows:

"Section 4830. Monthly statement by sheriff.—On or before the tenth day of each and every month the sheriff of each county shall furnish to the court of county commissioners, or board of revenue, as the case may be, to the state auditor, and to the state prison inspector, an itemized statement in detail, verified by affidavit, giving a list of all state and county prisoners by name, race and sex, the offense charged, **authority for committing,** disposition of prisoners, if sentenced, date committed, date sentenced, date discharged, (and) the number of days in jail. The sheriff shall set out the amount of money actually expended for purchasing and supplying of all foodstuffs for feeding prisoners during the month immediately preceding." (Emphasis supplied)

It is my opinion that a person confined in jail under the facts stated in your letter is a "prisoner" within the contemplation of the above quoted sections and that a court order, sentence or judgment, valid on its face, is sufficient authority for the sheriff to commit a person to jail. The State is liable for feeding prisoners committed to jail.—Biennial Report of Attorney General, 1930-32, page 1031. Indeed, it would be manifestly unjust to place upon the sheriff the duty of ascertaining the legality of every sentence, judgment or order committing a person to his jail.

In an opinion rendered to Hon. Chas. W. Lee, State Comptroller, on May 2, 1937, Biennial Report of Attorney General, 1936-38, page 238, it was held:

> "As to your third request, if the sheriff fails to have such mittimus on file as required by Section 4804, Code of Alabama, 1923, I would not say that this is such a derelict in duty as would bar the sheriff from collecting the feed bill. If the sheriff has actually had the prisoner and has actually fed and cared for him, I believe that justice and equity demands that he be paid and if he has been paid, that he should not be required to refund the money collected. Of course, his jail book should show when he was received in jail and when he was discharged from jail, but to make an iron clad rule that he must be able to produce the mittimus, I think would in many instances work an unjust hardship."

Therefore, it is my opinion that the State may, under such circumstances, legally pay the sheriff's feed bill claim.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 17, 1939.

Hon. Thomas W. Coleman,
Judge of Probate,
Calhoun County,
Anniston, Alabama.

Licenses—Person dealing in tractors used exclusively for breaking or cultivating land held liable for license levied by Schedule 22 B. of Schedule 22 of the 1935 Revenue Act, as amended.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 10, 1939, in which you request my opinion as follows:

> "Under Act 156 of the Acts of Extra Session 1936-37, page 178, an amendment to the Revenue Law provides for a license for the business of dealing in tractors.

"Please advise me if the word tractor, as used in this statement, applies to what is commonly called tractors used exclusively for breaking or cultivating land? Some years ago we had a ruling from a former Attorney General that a tractor used exclusively for farm purposes or breaking or cultivating land was a farm implement, and not a tractor."

The act to which you refer is Act No. 156, S. 75, approved March 2, 1937 (General Acts, 1936-37, page 178) which is an act amending Schedule 22 of Section 348 of Article XIII of Chapter 1 of the 1935 Revenue Act. The part of said act pertinent to your inquiry is as follows:

"Schedule—22. B.—Each person other than a licensee under Schedule 12, of Section 348 hereof for engaging in the business of dealing in Tractors, road machinery or trailers, shall pay the following license: In cities and towns of 50,000 inhabitants or over, State license of $50.00, county license of $50.00. In cities and towns of 25,000 inhabitants and less than 50,000, State license of $40.00, county license of $40.00. In cities and towns of 5,000 and less than 25,000, State license of $20.00, county license of $20.00. In all other places of less than 5,000 inhabitants, whether incorporated or not, State license of $10.00, county license of $10.00:" (This is the part added by the amendment and is the only material change made in the original schedule by the amendment.)

Original Schedule 22 levied a license only on the business of dealing in, renting or hiring bicycles and/or motorcycles and did not purport to levy a license on the business of dealing in tractors, road machinery or trailers.

In my judgment, the question propounded by you is answered in the affirmative, that is, the word "tractors" used in said schedule, as amended, applies to tractors used exclusively for breaking or cultivating land, by the holding of an opinion of this office to Hon. J. F. Aldridge, Solicitor, Greene County, Eutaw, Alabama, under date of June 24, 1936, Quarterly Report of Attorney General, Vol. III, page 200, which you will note was rendered prior to the time Schedule 22, supra, was amended to specifically levy a license on the business of dealing in tractors. In that opinion it was held that Schedule 12 of the 1935 Revenue Act, which levied a license on dealers in "automobiles, motor cars or other self-propelled vehicles, except motorcycles", included dealers in self-propelled farm tractors, it being reasoned, on the basis of the authorities therein cited, that farm tractors were included in the words "other self-propelled vehicles". That being so, it seems clear to admit of argument that tractors used exclusively for breaking or cultivating land would be included in the word "tractors" used in Schedule 22, as amended, supra, and, consequently, it is my opinion that a person engaged in the business of dealing in tractors used exclusively for breaking or cultivating land is liable for the license levied by Schedule 22. B. of said schedule, as amended.

Your attention is respectively invited to the opinion to Mr. Aldridge. You will note in that opinion that an earlier opinion of the office found in Biennial Report of the Attorney General, 1918-20, at page 607, being in conflict therewith, is overruled. No doubt it is that opinion to which you make reference in your letter of inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 17, 1939.

Hon. Ira Davis, Sheriff,
St. Clair County,
Ashville, Alabama.

Sheriffs—Arrest Fees—

Where a defendant is charged with two separate offenses, and is convicted and sentenced to hard labor in the one case and the other remains undisposed of; and at the expiration of sentence in the first case defendant remains at large on the second charge, and alias capias issued for his arrest, the officer making such arrest in the second case is entitled to arrest fees for each.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 6, 1939, requesting my opinion as follows:

"On September 27, 1938 one Will Black was arrested by the Sheriff on two warrants—one for violating the prohibition law and the other for possessing a still. He was convicted on the violating the prohibition law case and sent to the penitentiary. The Sheriff did not place a holdover against him on the still possession case and when his time was out, he returned to his home.

"In the meantime, I succeeded the former Sheriff and rearrested the same Will Black January 21, 1939 on the still possession case. He was convicted again and sent back to the penitentiary.

"Under the facts stated above, please advise me as to the following:

"1. Should the State pay for two arrests in the still possession case?

"2. If your answer to the above is negative, then who is entitled to the arrest fee, the former Sheriff or myself?"

Under your statement of facts, it was the duty of the Clerk, under Section 6730, Code of Alabama, 1923, when the defendant was sentenced to hard labor in the prohibition case, to place a holdover against him so he could have been returned from the penitentiary to stand trial in the possession of a still case. However, since this was not done, it became your duty as the present sheriff to procure a capias for his arrest and to serve same, which was done by you. This being true, you would be entitled to your arrest fee, and, of course, so would the former sheriff, that is, if he actually arrested the defendant on the charge of possession of a still. Therefore, the State would be liable for both arrest fees when the defendant was delivered to the Department of Corrections and Institutions under Section 3667, Code of Alabama, 1928 (Michie), where it says:

"For executing each warrant or writ of arrest ..... $4.00."

See Biennial Report of Attorney General, 1934-36, page 484.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

November 17, 1939.

Hon. W. H. Quillin, Judge,
Franklin County Law & Equity Court,
Russellville, Alabama.

Costs and fees—Where defendant pleads guilty to operating a motor truck for hire without a carrier's tag or permit as provided by Act No. 159, H. B. 113, approved October 28, 1932 (General Acts 1932, Extra Session, p. 178) and no appeal is taken, defendant is not entitled to privilege granted under provisions of Act No. 156, S. B. 143, approved March 16, 1939 (General Acts 1939, pamphlet, page 229) as to payment of solicitor's fee or fee for trial and entering judgment.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated November 8, 1939, which reads as follows:

"A person pleaded guilty in the Law & Equity Court of Franklin County on a charge of operating a motor truck for hire without a carrier's tag or permit in violation of Article three of Act No. 159, House Bill Number 113 of the General Acts of 1932 page 178 and was fined. Should a Solicitor's fee and trial tax be charged in the bill of costs? I have in mind Act No. 156 Senate Bill Number 143, approved March 16, 1939 by the Governor."

Your attention is called to Section 1 of Act No. 156, S. B. 143, approved March 16, 1939, (General Acts 1939, pamphlet, page 229) which reads as follows:

"1. That in all misdemeanor cases for violation of the State Highway Code, the State Highway Patrol Act and the rules of the road cognizable in Justice of the Peace courts, courts created in lieu of Justice of the Peace courts, County Courts, Inferior Courts, Law and Equity Courts, or courts of like jurisdiction, where the defendant pleads guilty and no appeal is taken, no fee shall be taxed or collected in said courts for trial, solicitor's fees, or entering judgment in such cases."

It appears from the above that no fee shall be taxed or collected for trial, solicitor's fee, or entering judgment in misdemeanor cases for the violation of the State Highway Code, the State Highway Patrol Act, and the laws known as the rules of the road, in which the defendant pleads guilty and no appeal is taken.

You state in the above request that the defendant plead guilty of violating Article III of Act No. 159, H. B. 113, approved October 28, 1932, (General Acts 1932, Extra Session, p. 178.)

Section 5 of Article III of Act No. 159, supra, reads as follows:

"Section 5: No contract carrier or common carrier shall operate any motor vehicle for hire for the transportation of persons or property upon any public highway in this State without first having obtained a permit therefor from the Judge of Probate of the County in which such carrier resides or has his principal place of business, or, if such carrier is a non-resident of this State, from the Judge of Probate of any County through which he operates or proposes to operate."

Act No. 159, supra, has to do with issuing permits for common carriers or contract carriers for the privilege of using the public highways of this State. In my opinion Act No. 159, supra, is a separate and independent act from the State Highway Code, the State Highway Patrol Act and the laws known as the rules of the road, and is not an amendment to any of the above. This fact, in my opinion, places violators of the provisions of Act No. 159, supra, beyond the pale of the provisions of Act No. 156, supra. Cf. Opinion of Attorney General to Judge of Inferior Court of Franklin County on October 5, 1939.

You are, therefore, advised that, in my opinion, where the defendant pleads guilty to violating the provisions of Act No. 159, supra, and no appeal is taken, a fee should be taxed as part of the costs for trial, solicitor's fee, and entering judgment.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 21, 1939.

Hon. Ben C. Morgan, Chief,
Game, Fish and Seafood Division,
Department of Conservation,
Montgomery, Alabama.

Game and Fish—

Section 1 of Act No. 522, H. B. 751, approved September 14, 1935, General Acts, 1935, page 1110, is not rendered inoperative when a river, due to high waters or floods, rises to such a height that locks or dams constructed on it are submerged.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated October 30, 1939, which reads as follows:

"Please refer to the Sanford Act, House Bill 751, approved September 14, 1935, Section 1 of this Act. Please advise us at the earliest possible moment if, in your opinion, this section will apply in time of high waters,

when the river level below the dam is the same as it is above the dam, except for the fall in the current. In other words, when the dam ceases to exist so far as navigation is concerned, can we construe that when the river is navigable without the use of the dam or locks by passing over said dam in a boat, we could permit the use of devices as set out in Section 1 of this Act?

"For generations, citizens of the Tombigbee and Warrior Rivers have made their living fishing for commercial non-game fish in these waters. Seventy-five percent of their living is made when the rivers are navigable over the dams. Could we interpret this Section as not applying when the rivers are navigable over the dams?"

You ask whether or not Section 1 of Act No. 522, H. 751, approved September 14, 1935, General Acts, 1935, page 1110, remains in full force and effect when, due to high waters or floods, a river rises to such a height that locks and dams constructed on it are submerged and said river becomes navigable without the aid of such locks and dams.

In my opinion the above question should be answered in the affirmative. Section 1 of Act No. 522 referred to in the above question is as follows:

"Section 1. That the use of hoop nets, gill nets, trammel nets, seines and all similar fishing devices is, by this Act, prohibited in all artificially impounded public waters of this State, and in all waters within one mile below any lock or dam constructed on any river or other body of public water in this State."

It will be noted that the above section, supra, provides in part that the use of hoop nets, gill nets, trammel nets, seines and all similar fishing devices are prohibited "in all waters within one mile below any lock or dam **constructed** on any river or other body of public water in this State." This language is clear and unambiguous and therefore must be given the meaning therein plainly expressed. **Abramson v. Hard,** 155 So. 590, 229 Ala. 2. Thus, giving this provision of said section, supra, the meaning plainly expressed therein, it will be observed that fishing with the devices named in said section, supra, is prohibited within one mile below a **constructed** lock or dam on any river or other body of water in this State, and therefore the fact that a river rises, due to high waters or floods, and overflows the constructed locks or dams on it would not have the effect of making Section 1, supra, inoperative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 21, 1939.

Hon. George C. Johnson,
Solicitor, Limestone County,
Athens, Alabama.

County Solicitor—Court of County Commissioners—

Court of county commissioners authorized to furnish county solicitor with telephone.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of November 7, 1939, in which you request my opinion as follows:

"The Solicitor's office of this County is now being furnished, at the expense of the County, a telephone under the authority of an Act on the subject passed at the Extra Session of the 1933 Legislature, Page 201.

"The Chairman of our Board of Revenue has recently received an opinion from your office touching upon a recent Act which was probably passed at the last Session of the Legislature relating to the furnishing of supplies to County offices, in which opinion your office has ruled that the Act is without force inasmuch as it fails to designate the funds from which said supplies are to be financed.

"I fail to see where this opinion in any wise repeals or nullifies the provision of the 1933 Act, to which I refer, under which the Solicitor's Office of Limestone County is furnished a telephone.

"I have advised the Board of Revenue that in my opinion they have the legal right to continue to furnish, at the expense of the County, a telephone for the office of the County Solicitor under the 1933 Act, and that the recent Act regarding the furnishing of supplies, etc., to County Office does not in any wise affect their right to do so as such Act did not repeal the 1933 Legislation.

"Please render me your opinion about this matter."

Your inquiry is concerned with the authority of the county board of revenue to furnish the solicitor's office of the county with a telephone.

The office of county solicitor in your county was created under the authority of Act No. 305, H. 582, approved June 27, 1939, Local Acts, 1931, page 148.

Act No. 187, S. 199, approved April 19, 1933, General Acts, Extra Session, 1933, page 201, authorizes the boards of revenue to furnish offices they designate in the courthouse with telephones. This Act has been held to be authority for furnishing the office of a county solicitor with a telephone. See

opinion to Hon. Cecil H. Strawbridge, County Solicitor, Lamar County, under date of January 26, 1936, Quarterly Report of Attorney General, Vol. II, page 64.

Therefore, the office of the county solicitor of Limestone County could be furnished with a telephone under the authority of Act No. 187, supra.

The recent enactment of the Legislature concerning the furnishing of certain solicitors' offices with office equipment, evidently the one to which you refer in your inquiry, is Act No. 329, H. B. 147, approved August 31, 1939. This act could in no wise affect the authority of the board of revenue to supply the county solicitor with a telephone since the only offices, other than those of circuit solicitors, with which the act is concerned are those of, "deputy solicitors, a part of whose salary is paid by the State, and assistant deputy circuit solicitors, a part of whose salary is paid by the State." See Section 2 thereof. See also opinion to Hon. W. C. Hare, under date of October 19, 1939, a copy of which is enclosed for your convenience.

Therefore, it is my opinion that the authority of the Board of Revenue of Limestone County to furnish its County Solicitor with a telephone has not been affected by this act, supra, or any opinion of this office.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 21, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Counties—Courts of County Commissioners—

1. Courts of county commissioners held authorized to distribute proceeds of taxes levied for general purposes, when a surplus over and above amounts necessary for governmental operations is on hand, to payment of bonded and warrant road debt.

2. Tax Assessors—Tax Collectors—Commissions—

(a) Tax assessor and tax collector held entitled to commis-missions on sliding scale on collections of taxes levied for general purposes.

(b) Tax assessor and tax collector and official bondsmen held liable for illegal collection of commissions.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of September 26, 1939, in which you request my opinion as follows:

"Please refer to Section 215 of the Constitution of 1901, Section 161 of the Revenue Act of 1935 (General Acts 1935, page 335), Section 22 of the Revenue Act of 1935 (General Acts 1935, page 272), and the following:

" 'This being the time set by law for the Court of County Commissioners to set the distribution of the 7½ Mills of taxes collected for County purposes, it is hereby voted and ordered that the various funds receive the following:

" 'The General Fund ..... 3½ Mills

The Special Fund for the maintenance and construction of roads and bridges in the sum of ..... 2½ Mills

The Special Road Fund for the payment of interest on the bonded and warrant debt and the retirement of same, in the sum of ..... 1½ Mills'

"and advise me as follows:

"1. Is the levy of 1½ Mills for Special Road Fund for the payment of interest on the bonded and warrant debt and retirement of same a legal levy of taxes, taking into consideration the fact that the county does not levy same to pay debts existing on the 6th day of December, 1875?

"2. In the event same is not a legal levy should the Tax Assessor refuse to assess and the Tax Collector refuse to collect such 1½ Mills levy?

"3. In the event the county governing body contends that the 1½ Mill levy is a part of the 5 Mill levy, authorized by Section 215, could the county governing body amend its minutes to the effect that same is a part of the 5 Mill levy?

"4. In the event the county governing body can amend its minutes, making such 1½ Mill levy a part of the 5 Mill levy, provided by Section 215 of the Constitution of 1901, would the Assessor and Collector be entitled to commissions on the sliding scale as provided for taxes levied for General purposes, or would they be entitled to the flat two percent, the commission provided on Special taxes?

"5. In the event the Tax Assessor and Tax Collector should receive commissions on the sliding scale instead of the two percent flat, would the Tax Assessor and Tax Collector and their official bond be liable for any amount received in excess of the amount earned on the sliding scale applied to the 3½ Mill levy for the General Fund and the 1½ Mill levy for the Special Road Fund?"

In reply, I wish to advise that in my judgment the statement of facts in your request does not disclose the manner of the levy of the taxes named. I presume that the levy was made in accordance with the law, that is, 5 mills for general purposes and 2½ mills for road and bridge purposes (Section 215, Constitution of Alabama, 1901). Therefore, I am here confronted with the distribution of the taxes named and not the levy.

You will note that your statement of facts is predicated upon "the distribution of the 7½ mills of taxes collected for County purposes."

In reply to your first question, I wish to advise that in my judgment the 1½ mills of taxes referred to in your request is a part of the 5 mill levy for general purposes, and, as long as the county has a surplus, the transfer of which, in the judgment of the county governing body, will promote the interest of the county, the proceeds from this 1½ mills may be paid, as directed by the county governing body, on its bonded and warrant road debt, pursuant to the authority vested in the county governing body by Section 1397(115) of Michie's Alabama Code of 1928, which reads as follows:

> "Section 1397(115) Surplus from general fund of county transferred to road fund.—The court of county commissioners, board of revenue, or other like governing body of any county in this state may transfer to the road fund of the county any surplus of the general funds of the county in the county treasury, or any part of such surplus whenever, in the judgment of such court or board, it will promote the interest of the county to make such transfer. Any surplus of the general fund so transferred shall be used only for the working of the public roads or the building of bridges or otherwise improving the roads of such counties."

See **Rhodes v. Marengo County Bank,** 205 Ala. 667, 88 So. 850, and **Phillips v. Atkins,** et al., 229 Ala. 15, 115 So. 527.

The answer to your first question dispenses with the necessity of answering your second and third questions.

In reply to your fourth question, I wish to refer you to an opinion of the Attorney General, rendered to Hon. B. P. Singleton, Chief Examiner of Accounts, under date of October 10, 1939, a copy of which is herewith enclosed. In accordance with the holding of that opinion, the commissions of the tax assessor and collector on collections from the 1½ mills are paid, respectively, on the sliding scales contained in Sections 22 and 161 of the Revenue Act of 1935, and not on the flat two percent rate for collections from special taxes, since the levy in question is a part of the 5 mill levy for general purposes, although distributed by the county governing body to the special purposes named in the resolution set out in your letter of inquiry. As you know, Sections 22 and 161 were amended by the 1939 Session of the Legislature, and the commissions of tax assessors and tax collectors earned after October 1, 1939, are figured, respectively, on the rates contained in said sections as amended.

In reply to your fifth question, I wish to advise that in my judgment any commissions collected, respectively, by the tax assessor and tax collector, other than those authorized by Sections 22 and 161 of the 1935 Revenue Act (Sections 22 and 161, as amended as to commissions earned after October 1, 1939), necessarily must be held to be a collection of fees without authority of law. An officer may receive only such compensation as is authorized by law.

Torbert v. Hale County, 131 Ala. 143, 30 So. 453, and **McElderry v. Abercrombie, etc.,** 213 Ala. 289, 104 So. 671. Since, as pointed out above, the commissions of the tax assessor and the tax collector on the collections from the 1½ mill levy must be figured on the sliding scales, rather than the flat two percent rate, the tax assessor and tax collector, and their official bondsmen, will be liable, respectively, for any amounts overpaid to the tax assessor and tax collector as a result of an erroneous computation of the commissions on the flat two percent rate.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 21, 1939.

Hon. R. E. King,
Tax Collector, Mobile County,
Mobile, Alabama.

Taxation—Exemptions

Exemption from taxation granted to certain factories and plants authorized under Section 3 of Article 1 of the Revenue Act of 1935, as amended, does not apply to plants already constructed at the time of passage of the act.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of October 20, 1939, in which you request my opinion as follows:

"On December 6th, 1938, the Board of Revenue and Road Commissioners, under authority of House Bill 64-Calhoun, approved March 26th, 1936, granted the Gulf Shipbuilding Corporation exemption from all County Taxes for a period of ten years.

"Please read the attached resolution and advise the writer if he is correct in his refusal to grant this exemption, basing his refusal on subsection (b) Section 3, Bottom of Page 45, General and Local Acts, Alabama, Extra Session 1936, which reads as follows:

" 'Provided that where such plant is not operated for a consecutive period of 12 months, such fact shall be prima facia evidence of such abandonment.'

"From all information, these people have not built the first improvements nor have they worked anyone, other than a small office force.

The writer's contention is also that until this Company puts some improvements and starts to manufacture ships, that they are not entitled to any exemption in any shape or form.

"For your further information the State Tax Commission refused to allow any exemptions on the State Taxes. Please advise me as soon as possible, returning the attached resolution."

"The former owners, The Chickasaw Ship Building Company never enjoyed any exemptions from either the State, County or School taxes of Mobile County.

"From all information available the writer understands that the new company purchased practically everything from the former owners, however, up to the present time no improvements or buildings of any kind has been done."

The answer to your inquiry necessitates a consideration of Section 3 of Act No. 194, H. B. 324, approved July 10, 1935, General Acts, 1935, pp. 256, 259 (General Revenue Act of 1935), as amended by Act No. 76, H. B. 64, approved March 26, 1936, General and Local Acts, 1936, p. 44.

The pertinent parts of said amended Section 3, supra, are as follows:

"For the purpose of encouraging the building, extending and operation of *** plants for the purpose of building ships *** the Court of County Commissioners, or other Court or Board having like jurisdiction of any county, and the constituted authorities of any city or town in which it is proposed to locate, or add to, or to extend any such factories or plants are authorized and empowered to remit the taxes assessed for all county and municipal purposes, except for county schools and school district purposes, on such (factories) or plants and on all extensions or additions to such (factory) or plant as are already built and operated, and on all plants, works, machinery and other equipment of such (factories) or plants, or additions thereto, or extensions thereof, and also on all of the capital stock of such factories and plants or increase of such capital stock made for the purpose of making the additions thereto or extensions thereof for a period not exceeding ten years from the date of the incorporation or organization of such (factories) or plants, if incorporated and organized under the laws of the State of Alabama, *** . Provided nothing herein shall authorize the exemption of the land on which such factories or plants are located or proposed to be located. *** The exemption granted to any (factory) or plant becoming entitled to its enjoyment, and as to the capital stock thereof, shall cease whenever the operation of such factory or plant for the purpose of its construction shall be abandoned. Provided that where such plant is not operated for a consecutive period of twelve months, such fact shall be prima facie evidence of such abandonment *** ."

And likewise the provisions:

"Provided that the period of the foregoing exemptions shall not be extended, renewed or in any way added thereto, because of any reincorporation, **or reorganization of the original corporation, or sale of the assets to a different person, firm or corporation.**

"(c) Provided that said exemption and remission shall not apply to property, which, at the time of passage of this Act, **constitutes any factory, mine or plant, already erected or constructed, within the state at the time of the passage of this Act.**

"Provided, however, that nothing contained herein shall be held or construed to authorize or empower any Court of County Commissioners Boards of Revenue or like governing body of any county in this State, or the governing body of any municipality within this State, or the State Tax Commission or any of its agencies, to exempt from taxation, either as to ad valorem, franchise or capital stock, any plant, factory or other institution, herein mentioned, whether a corporation, individual or partnership, where such plant, factory, addition thereto or machinery and equipment have been built or completed, or the machinery or equipment therein installed, prior to the passage of this Act, it being the intention of this provision not to exempt any plant, factory or institution herein mentioned from any taxation which is now subject."

One of the purposes of this Act was to encourage the building, extension and operation of plants for the building of ships in this state.

It appears from your letter that this plant had already been erected prior to the passage of the act and the plant sold to Gulf Shipbuilding Company and that no improvements, operations or building of any kind have been done.

Exemptions from taxation must be strictly construed in favor of the taxing power. **Holt v. Long,** 235 Ala. 369, 174 So. 759.

Exemptions from taxation whether stautory or constitutional are to be strictly construed against the exemption and in favor of the right to tax, and no person or property is to be exempted unless the intention to exempt clearly appears. **State vs. Elba Bank and Trust Co.** 18 Ala. App. 253, 91 So. 917.

One who claims exemption from taxation has the burden to show that all conditions on which the exemption was based have been at all times fulfilled. **Yazoo & M. V. R. Co. vs. Adams,** 81 Miss. 90, 32 So. 937.

Legislature has power to exempt industrial plants from taxation for limited period as inducement to location in State. **Crow v. General Cable Corporation.** 22 Ala. 611, 137 So. 657. **Pullman Car & Mfg. Co. vs. Hamilton,** 229 Ala. 184, 155 So. 616.

Entire Tax statute should be considered in constructing proviso giving exemption. **Hawkins vs. Peoples Finance and Thrift Co.** 219 Ala. 558, 122 So. 650.

If the consideration of the grant of exemption is the construction and maintenance of certain public improvements, the exemption is lost by failure to complete and operate such improvements. 26 Ruling Case Law 302.

Exemption is based on certain conditions thereto and a non compliance with the conditions bars the claim of exemption. 61 Corpus Juris 402.

Where the statute granting an exemption conditions its enjoyment upon the existence of certain facts or the performance of certain acts, the exemption does not attach until the performance of such condition. 61 Corpus Juris 406.

The exemption is forfeited by the abandonment of the enterprise or the total discontinuance of the business. 61 Corpus Juris 437-438.

In my opinion the legislature intended to say if the manufacturer established his factory or plant in this State, made additions thereto and operated the same then he might be exempted from taxation as to his factory or plant. I do not believe that the object of the law can be frustrated by the company merely maintaining a small office force, or by merely purchasing a plant that had been erected many years before the passage of the Act granting the exemptions.

The Board of Revenue and Road Commissioners of Mobile County had only such authority as given to them under the Act. It follows that the Board was without authority in granting exemptions to a plant and its additions thereto that had already been built or erected and the machinery and equipment thereto installed prior to the passage of the Act.

It appears from your letter that this property had never enjoyed any exemptions thereby indicating that its former owners were not entitled to any exemptions.

The petition of the Gulf Shipbuilding Company alleges that the company "intended to build, establish and operate upon the lands an extensive shipbuilding plant" "make enlargements and extensions."

Your statement that no works of any kind have been started clearly indicates that the Board of Revenue and Road Commissioners acted under a clear misstatement of the facts by the petitioner.

I am therefore of the opinion that any rights granted were forfeited on account of the misstatement of facts to the Board plus the absolute failure of the company to carry out the conditions imposed and that the exemptions were not allowed pursuant to the provisions of the Act.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 21, 1939.

Hon. Richard C. Foster, President,
University of Alabama,
University, Alabama.

University of Alabama—Scholarship for medical tuition fee—

Student in Medical School of the University of Alabama may not attend free of any tuition fee, unless he is a resident of the county whose governing body recommends that he be received free of any tuition fee as of good character and education and without the means of procuring medical instruction (Section 2 of Act No. 282, H. B. 323, approved March 4, 1907, General Acts, 1907, p. 340).

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 9, 1939, in which you request my opinion as follows:

"In 1907 there was enacted by the Legislature of Alabama a law which appears on page 340 of the Acts of 1907. I believe that it has been reenacted in the School Code but I can't find it there.

"The title of the law is 'To Provide Necessary Funds for maintenance, improvements, apparatus, and additions to the medical college of Alabama.'

"Section 2 of the Act provides in part 'That one student from each county in the State shall be received in said (Medical) College, free of any tuition fee, upon the recommendation of the Commissioners Court, that said student is of good character and education and is without the means of procuring such medical instruction.' This section also provides a small annual appropriation amounting now to $3500.00 to cover the cost of instruction for students holding such free scholarships.

"The University has recently received from the Court of County Commissioners of Winston County a resolution awarding said scholarship for said County to one Mr. W. T. Snoddy, Jr., for the school year 1939-40. Young Mr. Snoddy entered the Medical School of the University of Alabama in the 1938-39 session from Jefferson County, Alabama, and for that session was the designated recipient of this free scholarship by resolution of the governing body of Jefferson County, Alabama. Investigation reveals that young Mr. Snoddy is still a resident of Jefferson County, Alabama, and has lived there with his parents since his birth.

"The University administration has consistently interpreted the Act as meaning that no student can be designated by the governing body of a county as the recipient of the free scholarship for a student 'from the county' unless the student is a resident of the county.

"Since the Snoddy case has arisen and young Mr. Snoddy's father insists that he is a rightfully designated recipient of the scholarship, I feel it necessary to ask your official opinion on the following question involving the interpretation or meaning of the law:

"Does the Act above referred to authorize the governing board of any county to designate as a recipient of such scholarship from such county a medical student who is not a resident of the county whose governing board makes the designation?

"I shall appreciate very much receiving your opinion on this at your early convenience."

The medical scholarship to which you refer, which entitles the recipient to attend the Medical School of the University of Alabama free of any tuition fee, is provided for by Section 2 of Act No. 282, H. B. 323, approved March 4, 1907, General Acts, 1907, p. 340, which reads as follows:

"Section 2. That one student from each county in the State shall be received in said college, free of any tuition fee, upon the recommendation of the commissioners court, that said student is of good character and education and is without the means of procuring such medical instruction. To cover the cost of instructions for students holding such free scholarships, the sum of five thousand dollars ($5,000.00) is hereby appropriated annually to be available in equal semi-annual installments on the first days of October and April."

You state that you believe this section has been reenacted in the Alabama School Code of 1927. However, research fails to disclose the incorporation of said act in the Code of Alabama, 1907, the Code of Alabama, 1923, or the Alabama School Code of 1927. Nevertheless, in my opinion, this provision of our statutory law relating to these scholarships and the method of designating the recipient is still in full force and effect, since it comes within the saving clauses contained in Section 10 of the Code of Alabama, 1907, Sections 11 and 12 of the Code of Alabama, 1923, and Section 5 of the Alabama School Code of 1927, respectively.

You state in your letter that appropriation to cover the costs of instruction for students holding these free scholarships, which was $5,000 in Section 2, supra, now amounts to $3,500. I presume that this reduction was made by the provisions of Section 9 of Act No. 292, S. 236, approved November 9, 1932, General Acts, 1932, p. 288, and that this amount has been included in every annual appropriation made to the University of Alabama by the Legislature since that date.

Answering your question specifically, I think it too clear to admit of argument that Section 2, supra, only authorizes the governing body of each county in the State to designate as the recipient of the scholarship thereby provided for from that county a student in the Medical School of the University of Alabama who is a resident of that county, and that it contains no authority whatever for the governing body of one county designating as the recipient of such a scholarship from that county a resident of some other county in the State of Alabama. The scholarship provided for is for "one student from each county in the State", and the manner by which the student receives the scholarship is "upon the recommendation of the commissioners court (county governing body)," which, in my judgment, very clearly means the county governing body of the county in which the student recommended for the scholarship resides. Any other holding might result in a number of medical students who were residents of the same county receiving scholarships at the same time pursuant to recommendations made by the county governing body of various other counties in the State, whereas, the section, supra, provides for such a scholarship for "one student from each county in the State."

Consequently, it is my opinion that the administrative authorities of the University of Alabama have correctly interpreted the statute, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 21, 1939.

Hon. R. H. Williams,
Judge of Probate,
Marshall County,
Guntersville, Alabama.

Circuit Solicitors—Act No. 329, H. 147, approved August 31, 1939—

1. County in which the Circuit Solicitor resides required to provide suitable offices for the use and occupancy of the Circuit Solicitor.

2. County governing body of such county may provide such suitable offices, and pay the rent thereon, at any place in the county it deems most advisable.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of October 24, 1939, in which you request my opinion as follows:

"Please refer to Section 3 of the Solicitor's Bill, House 147, approved August 31, 1939, and advise me whether Marshall County is required to provide suitable office space for the use of our Circuit Solicitor who resides in Boaz, Alabama, in Marshall County, there being no room for the Solicitor in either of our Courthouses.

"Is the County required under the above mentioned bill to pay for office rent for the Solicitor in his home town of Boaz, Alabama?"

The act to which you refer in your letter of inquiry is Act No. 329, H. 147, approved August 31, 1939. Section 3 of said reads, in pertinent part, as follows:

"The several counties of the state are hereby authorized, directed and required to provide suitable offices for the use and occupancy by such solicitors, deputy solicitors, and assistant deputy circuit solicitors in the counties where such officers reside, *** ."

It can be seen from the above quoted provision of said act that the county of the Circuit Solicitor's residence is not only authorized, but directed and required, to provide the Circuit Solicitor with suitable offices.

The remaining question for decision, therefore, is whether or not such suitable offices may be provided outside the courthouse, without regard to

the availability of space in the courthouse, and, if so, whether or not such suitable offices must be located in the county site or sites or may be located elsewhere in the county.

In an opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, under date of January 21, 1927, (Biennial Report of Attorney General, 1926-28, p. 67), it was held that there was no authority of law for a county paying the office rent of either a circuit judge or a circuit solicitor, resident in the county, where there was no suitable space for them in the courthouse. At the time of the rendition of that opinion, Section 6755, Subdivision (1) of the Code of Alabama, 1923, which is the section detailing the authority of the county governing body in such respect, appeared in this language:

"6755. Authority of court.—The court has authority—

"1. To direct and control the property of the county as it may deem expedient according to law, and in this direction and control it has the sole power to locate the courts in the rooms of the courthouse and to designate the rooms to be occupied by the different officers entitled to rooms therein, and to change the location of the courts, and the designation of rooms for officers, as it may deem best and most expedient, and this shall be done by order of the court entered upon the minutes at a regular term of the court."

A short time later the above quoted subdivision of Section 6755 of the Code of Alabama, 1923, was amended by Act No. 75, H. 150, approved February 18, 1927 (General Acts, 1927, p. 57) to read as follows:

"1. To direct and control the property of the County as it may deem expedient according to law, and in this direction and control it has the sole power to locate the courts in the rooms of the courthouse and to designate the rooms to be occupied by the officers entitled to rooms therein, **including the circuit judge, if resident in the county,** and to change the location of the courts, and the designation of the rooms of the courts, and the designation of the rooms for officers, as it may deem best and most expedient, and this shall be done by order of the court entered upon the minutes of the court at a regular term of the court. **In the event the courthouse is inadequate to supply office rooms for such officers, the court may lease such office rooms in a convenient location in the county site and to pay the rental from the county funds."** (Emphasis supplied)

The material changes made by the amendment are shown by the additions above indicated by emphasis. In an opinion to Hon. J. N. Mullins, Solicitor, Twentieth Judicial Circuit, Dothan, Alabama, under date of April 8, 1927 (Biennial Report of Attorney General, 1926-28, p. 159), this office again considered the question of whether or not there was any authority of law for a county governing body paying the office rent of a circuit solicitor or county solicitor, resident in the county, where the courthouse was inadequate to supply office rooms for such officers in the light of this amendment to Subdivision 1 of Section 6755, supra. Attention was called in that opinion to the fact that the amended statute provided for circuit judges, but was silent as to solicitors, both circuit and county. It was concluded that Subdivision 6755, as amended, supra, gave the county governing body of a county no authority to pay the office rent of a circuit solicitor or county solicitor in any event.

Section 6755 has been subsequently amended, but in respects not here material, and, therefore, the subsequent amendments to said section will not be here considered.

The holding of both opinions hereinabove referred to, in so far as it pertains to solicitors, was reaffirmed in an opinion to Hon. W. C. Batson, Judge of Probate, Chambers County, LaFayette, Alabama, under date of May 25, 1939 (Biennial Report of Attorney General, 1930-32, p. 296). In my judgment, those opinions clearly stated the law on this subject and, for that reason, the subsequent opinion of this office to Hon. T. R. Martin, Judge of Probate, Bullock County, Union Springs, Alabama, under date of June 17, 1932 (Biennial Report of Attorney General, 1930-32, p. 893) which reaches a different conclusion, being laid in error, is hereby expressly overruled. I think it advisable to point out that the 1931 amendment to Section 6755 referred to in the opinion to Judge Martin, did not alter, change or modify in any respect the provisions of Subdivision 1 thereof as it existed after the 1927 amendment thereto, supra.

Thus, it can be seen that prior to Act No. 329, supra, there was no authority of law for the county of a circuit solicitor's residence to furnish suitable offices for him, the rent thereon to be paid by the county, at the county site or anywhere else in the county, even though the condition in the courthouse was such that there was no room for him to have suitable offices therein.

To remedy this situation, the Legislature could have further amended Subdivision 1 of Section 6755, as amended, supra, to have included therein circuit solicitors in the same manner as circuit judges were included by the 1927 amendment. Had it seen fit to do so, then the county could have provided the circuit solicitor with suitable offices outside the courthouse, the rent thereon to be paid by the county, only in the event the courthouse was inadequate to supply such suitable offices, and then only in the county site.

However, the Legislature did not see fit to do so. Instead, in order to remedy this situation and to be sure that the circuit solicitor was provided, at the expense of the county of his residence, with suitable offices in such county, it passed an original act, which is Act No. 329, supra, the pertinent provisions of which are quoted above. It is to be noted that this act does not contain any requirement that suitable offices for the use and occupancy of the circuit solicitor, to be located in the courthouse, if there is space available therein for such purposes, or that they be located in the county site, if there is no space available in the courthouse for such purposes. The only restriction is that such suitable offices be located "in the county where such officers reside." Therefore, it is my judgment that pursuant to the above quoted excerpt from Act No. 329, supra, the county governing body of a county in which the circuit solicitor resides may provide suitable offices for the use and occupancy of the circuit solicitor, the rent thereon to be paid by the county, at any place in the county which the governing body deems most advisable, regardless of whether or not there is sufficient space available in the courthouse for such purpose, and regardless of whether or not such suitable offices are located in the county site. It is my opinion that the question of where such suitable offices are located within the county of the circuit solicitor's residence is a matter that addresses itself entirely to the discretion of the county governing body of the county of his residence, which

county governing body is charged by law with general supervision and control of the finances of the county.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 22, 1939.

Hon. Asa Rountree, Jr.,
State Director of Airfield Development,
Aviation Commission,
Montgomery, Alabama.

States—The State Aviation Commission—

Members of Commission, its aeronautical advisors and employees entitled to reimbursement for all actual and necessary traveling expenses and disbursements incurred by them while traveling on official business for the Commission.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 15, 1939, in which you request my opinion as follows:

"This is to request an opinion relative to the payment of traveling expenses of the State Aviation Commission.

"Please refer to 'The State Aviation Commission Act', which is Act No. 493, S. 77, approved September 13, 1935, General Acts 1935, page 1046, and particularly to Section 5 thereof and advise us on the following matter:

"1. Are the members of the Aviation Commission, its aeronautical advisors and its employees entitled to be reimbursed for all actual and necessary traveling expenses and disbursements incurred by them while traveling on official business of the Commission; or, are they limited in the amount which they may be reimbursed for such expenditures to $3 per day as per the provisions of the McGowin Act of 1933?

"We would appreciate your opinion on this matter at your earliest convenience."

In my opinion, your inquiry should be answered in the affirmative, i. e., the members of the Aviation Commission, its aeronautical advisors and its employees are entitled to be reimbursed for all actual and necessary traveling expenses and disbursements incurred by them while traveling on official business for the Commission, and they are not limited in the amounts which they may be reimbursed for such expenditures to $3.00 per day by the provisions of the McGowin Act of 1933.

The McGowin Act, which is Act No. 87, H. 6, approved March 23, 1933 (General Acts, 1933, p. 81), provides:

"Section 1. The maximum amount allowable to persons travelling in the service of the State of Alabama or any of its agencies or institutions for expenses other than actual expenses of transportation shall be $3.00 per diem."

This Act controls the expense allowances of persons traveling in the service of the State, or any of its agencies or institutions, unless there are later acts relating to certain State agencies or institutions which effect a repeal of same insofar as those certain agencies or institutions are concerned.

However, the State Aviation Commission Act, which is Act No. 493, S. 77 approved September 13, 1935 (General Acts, 1935, p. 1046), contains the following pertinent provisions in Section 5 thereof:

"The Commission, aeronautical advisors and employees of the Commission shall be reimbursed for all actual and necessary traveling expenses and disbursements incurred by them in the discharge of their official duties authorized by the Commission." (Emphasis supplied)

Section 22 of said Act provides:

"REPEAL: All Acts or parts of Acts which are inconsistent with the provisions of the Act are hereby repealed."

It can be readily seen that Act No. 87, supra, is in conflict with the quoted excerpts from the State Aviation Commission Act, and it necessarily follows, therefore, that the State Aviation Commission Act, being the last expression of legislative will on this subject, controls, and the provisions of Act No. 87, supra, are repealed insofar as they affect the members of the State Aviation Commission, its aeronautical advisors and its employees. Consequently, the members of the State Aviation Commission, its aeronautical advisors and its employees are entitled to be reimbursed for all actual and necessary traveling expenses and disbursements incurred by them while traveling on official business of the Commission, in accordance with the excerpt from Section 5 of the State Aviation Commission Act, quoted supra.

Cf. Opinions to Hon. I. T. Quinn, Commissioner of Game and Fisheries, Capitol, under date of October 15, 1935, Quarterly Report of Attorney General, Vol. I, p. 74 and under date of April 3, 1936, Quarterly Report of Attorney General, Vol. III, p. 11; and to General John C. Coleman, Adjutant General, Capitol, under date of October 7, 1937, Quarterly Report of Attorney General, Vol. IX, p. 25.

Your attention is called, however, to the fact that, pursuant to the provisions of Section 820 of the Code of Alabama, 1923, all claims for traveling expenses incurred by one traveling in the service of the State or any of its institutions or agencies must be itemized, verified by affidavit, with vouchers therefor attached, before the Comptroller can lawfully issue a warrant in payment of the same. See opinion to Hon. B. P. Singleton, State Comptroller, Capitol, under date of April 22, 1939, Quarterly Report of Attorney General, Vol. XV, p. 53.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

November 22, 1939.

Hon. R. A. Polglaze, Secretary,
Board of Registration for Professional
Engineers and Land Surveyors,
117 Webb Crawford Building,
Birmingham, Alabama.

Expenditures from Engineers' Fund—

Under Act No. 271, Senate 182, approved September 2, 1935, General Acts of 1935, page 661, it is within the discretion of the Board to contribute to the support of the Engineers' Council for Professional Development from the Professional Engineers' Fund.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion under date of November 9, 1939. which reads as follows:

"This Board has directed that I write you for an opinion of the following question:

"Can this Board make a contribution from the Professional Engineers' Fund toward the support of the Engineers' Council for Professional Development?

"The Engineers' Council for Professional Development is an organization representing the American Society of Civil Engineers, American Institute of Mining & Metallurgical Engineers, American Institute of Electrical Engineers, American Institute of Chemical Engineers, The Society for the Promotion of Engineering Education and the National Council of State Boards of Engineering Examiners.

"The Program of this organization is carried out under the direction of four operating Committees. One of these Committees, known as the Committee on Engineering Schools, publishes a list of accredited undergraduate engineering curricula which contains a list of all the engineering schools meeting the requirements they have adopted.

"This Board has adopted this list, but not exclusively, as being schools and colleges 'Approved by the Board as of satisfactory standing' as provided for under Section 12, (1) a, Act No. 271, Alabama General Laws.

"The Engineers' Council for Professional Development is at present being supported by contributions from the Engineering Foundation, Society for Promotion of Engineering Education and by Accrediting fees from the various Institutions which ask for such accrediting.

"Section 9, Act No. 271, Alabama General Laws, provides, among other things, 'The Board may employ such clerical or other assistants as are necessary for the proper performance of its work, and may make expenditures of this fund for any purpose which in the opinion of the Board is reasonably necessary for the proper performance of its duties under this Act.'

"The Engineers' Council for Professional Development has requested donations from the various State Boards for the support of its work. This Board desires, however, to have an opinion from you as to whether or not a donation to the Engineers' Council for Professional Development would be an expenditure reasonably necessary for the performance of its work. Therefore, the question stated at the beginning of this letter is submitted to you for an opinion.

"I am enclosing herewith a copy of The Journal of Engineering Education, published by this organization, for such information as you may find in it of value."

In my opinion, it is within the discretion of your Board as to whether or not the Board may contribute to the support of the Engineers' Council for Professional Development from the Professional Engineers' Fund. Section 9 of Act No. 271, Senate 182, approved September 2, 1935, General Acts of 1935, page 661, provides in part as follows:

" * * * The Board may employ such clerical or other assistants as are necessary for the proper performance of its work, **and may make expenditures of this fund for any purpose which in the opinion of the Board is reasonably necessary for the proper performance of its duties under this Act,** including the expense of the Board's delegates to annual convention of, and membership dues to, the National Council of State Boards of Engineering Examiners. Under no circumstances shall the State Auditor in payment of the expenses and compensation provided for in this Act exceed the amount of the examination and registration fees collected as herein provided." (Emphasis supplied)

If the Board is of the opinion that such a contribution is reasonably necessary for the performance of its duties, then the Board can make such contribution from the Engineers' Fund. The above is, of course, subject to limitation that the total expenditures do not exceed the amount of examination and registration fees collected. (See the last sentence of Section 9, supra.)

Compare opinion to Commissioner of Agriculture and Industries of February 21, 1938, a copy of which is enclosed.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 22, 1939.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Licenses—Attorneys—

Under Act No. 551, S. 329, approved September 19, 1939, the provisions of Subsection (c) of Section 353 of the 1935 Revenue Act still apply to the license on attorneys—i. e., it becomes due and payable

as of October 1st of each year, and delinquent on November 1st thereafter, and after delinquency becomes subject to a penalty of 15% of the amount of the license and interest at 6% from date of delinquency.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 8, 1939, in which you request my opinion as follows:

"I would like to submit the following question, which has arisen in this County, for your opinion, viz:

"Is an attorney, who failed to pay the current license by the last day of October, liable to the penalty provided for in the General Revenue Law? Or is he governed solely by Section 11 of the Act, approved September 19, 1939, amending the Integrated Bar Act, and which does not provide for the penalty of 15%? That is to say, may he now pay the sum of $25.00 for his license, without an additional penalty?"

Prior to the effective date of the 1935 Revenue Act i. e., October 1, 1935, the license on attorneys was levied by Section 11 of Act No. 133, H. 412, approved August 9, 1923, (General Acts, 1923, p. 100) as amended by Act No. 241, S. 85, approved June 6, 1931 (General Acts, 1931, p. 284). However, the license on attorneys was included in the 1935 Revenue Act, along with all other privilege licenses generally, and at the same time the amount of the license was substantially increased. Schedule 10 of said act, which deals with this subject and levies the license, reads as follows:

"Schedule 10. Each attorney engaged in the practice of law shall pay an annual license of Twenty-five Dollars ($25.00) to the State, but no license shall be paid to the County. If such business is conducted as a firm, or as a corporation in which more than one lawyer is engaged, each lawyer, so engaged, shall pay a license; provided, that the license imposed by this Schedule shall not apply until such attorney shall have practiced his or her profession as long as two (2) years. Ten Dollars ($10.00) of the license herein levied together with the fees paid by applicants as otherwise provided by law, shall remain in the State Treasury and shall constitute a separate fund to be disbursed by the State Treasurer on the order of the Board of Commissioners of the Alabama State Bar Association. As soon after the first day of October in each year as practicable the State Treasurer shall certify to the Secretary of the Board of Commissioners of the Alabama State Bar Association the names of attorneys who have paid such license fee, and no attorneys who are in default in the payment of such fee shall be recognized in the voting or transaction of business by the State Bar as being in good standing. Provided, however, that no lawyer shall be required to pay a license until after he has practiced his profession for two years."

Subsections (c) and (d) of Section 353 of the 1935 Revenue Act contain provisions for a grace period for the payment of licenses levied by the act generally, provisions for penalties in cases of delinquency, and provisions making it unlawful for the issuing authority to fail to collect such penalties. These subsections read, respectively, as follows:

"(c) All licenses levied by this Act except as otherwise provided shall be due and payable as of October first of each year and shall be delinquent November first thereafter. Where any license issuable by the Probate Judge or Commissioner of License shall be delinquent, the same shall be subject to a penalty of 15 per cent of the amount of the license, which penalty must be collected by the Probate Judge or Commissioner of Licenses when the license is taken out together with interest at 6% from the date of delinquency. (d) It shall be unlawful for any Probate Judge or other officer to fail to collect such penaltics when issuing such licenses."

They were applicable to the license on attorneys levied by Schedule 10, supra.

However, the 1939 Legislature enacted Act No. 551, S. 329, approved September 19, 1939, which, among other things, amended Section 11 of the 1923 Act, supra, as theretofore amended by the 1931 Act, supra to read as follows:

"Section 11: License Fee. Every Member of the State Bar shall, prior to the first day of October in each year in the same manner as required by law for the payment of license fees, pay as a license fee the sum of Twenty-Five ($25.00) Dollars, but no license shall be paid to the County. Ten ($10.00) Dollars of the license herein levied shall remain in the State Treasury as a part of the General Fund and Fifteen ($15.00) Dollars thereof, together with the fees paid by applicants for admission as provided for in the preceding section, shall constitute a separate fund to be disbursed by the State Treasurer on the order of the Board of Commissions of the State Bar. The said fund shall be paid out by the Treasurer as heretofore, or if directed by said Board, on receipt of a voucher therefor and a copy of the order of the Board of Commissioners, directing the payment of such fund to the signer of said receipt. As soon after the first day in November in each year as practicable, the State Treasurer shall certify to the secretary of the Board of Commissioners the names of attorneys who have paid such license fee, and the Judge of Probate of each county shall certify to the Judges of the Circuit Court having jurisdiction in such County the names of the attorneys who have paid such license fee, and no attorneys who are in default in the payment of such fee shall be recognized in the Courts of Alabama or in the voting or transaction of business by the State Bar as being in good standing until they have paid the required license fee. Provided that no lawyer shall be required to pay a license until the first day of October following the expiration of two years from his admission to the Bar."

The question now before us is: In view of Section 11, as amended by Act No. 551, supra, do the provisions of Subsections (c) and (d) of the 1935 Revenue Act, supra, still apply to the license on attorneys? In my judgment, this question must be answered in the affirmative. Section 11, as amended by Act No. 551, supra, was evidently intended as a substitute for Schedule 10 of the 1935 Revenue Act, with a different distribution of the proceeds derived from the license on attorneys being the principal change made thereby. The amount of the license, the manner of its collection, and the manner of the distribution of the proceeds derived therefrom are the same, and the regulatory provisions of both Schedule 10, supra, and Section 11, as amended by Act No. 551, supra, are substantially the same, the principal difference between them being that, whereas, under Schedule 10, supra, an attorney was not required to pay a license until after he had practiced his profession for two years, under Section 11, as amended by Act No. 551, supra, he is not

required to pay a license until the first day of October following the expiration of two years from his admission to the Bar.

Section 11, as amended by Act No. 551, supra, makes no reference to a grace period for the payment of the license, and no provision for penalties in the case of delinquency or for the enforcement of the collection of such penalties, and, therefore, is entirely consistent with the retention of the provisions of the 1935 Revenue Act, supra, in regard thereto. Upon this question no conflict whatever arises.

Apt authority for this holding is found in the opinion of the Supreme Court of Alabama in the very recent case of **Pharr v. Whittle,** 237 Ala. 124, 185 So. 895. The question before the court for decision in that case was whether or not a Justice of the Peace had jurisdiction of the offense of driving a motor vehicle upon the public highway of the State while under the influence of intoxicating liquors, the offense having been committed within the territorial jurisdiction of the Justice. We quote in extenso from that opinion:

> "The Act first creating the offense here involved (General Acts 1919, page 1002) did not confer such final jurisdiction upon the justice of the peace, nor was it so conferred when brought forward into section 3324, Code of 1923. But this offense was embraced in what is referred to as the Highway Code of 1927.—General Acts 1927, page 348, section 48, page 365, sections 104 and 105, pages 389-390, and Michie's Code of 1928, section 1397 (50), section 1397 (106), section 1397 (107).
>
> "And it is the State's insistence that the jurisdiction was conferred by the Highway Code as to all the offenses therein named, including that of driving while under the influence of intoxicating liquors.
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> * * *
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> "We think these provisions of the Act suffice to show that the jurisdiction conferred upon and the hearing before the magistrate referred to in section 104 was a final jurisdiction, and not merely for a preliminary hearing, and that the legislative intent is clear to that effect from the language used.
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> "We conclude, therefore, that the Highway Code of 1927 conferred jurisdiction of this offense upon the justice of the peace.
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> * * *
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> "But the offense for a violation of such petitioner is charged, is now defined by the Act of March 4, 1937, repealing all laws in conflict therewith,—General and Local Acts 1936-7, page 229,—and it is argued that if jurisdiction was ever conferred upon the justice of the peace for such offense any such provision is repealed by this latter Act.
>
> * * *
>
> "The Act of March 4, 1937, was evidently intended as a substitute for section 84 of the Highway Code of 1927, with some modification as to the offense and the penalty for its violation, together with a change in the distribution of the proceeds derived from its enforcement. But the offense, as we have previously observed, was triable before the justice of

the peace under the provisions of sections 104 and 105 of the Highway Code. The Act of March 4, 1937, makes no reference to that subject and is entirely consistent with the retention of these provisions in the law. Upon that question no conflict whatever arises. Under general rules of construction, therefore, these provisions remain in force and undisturbed. —59 Corpus Juris, 1094 and 1096; **Levy-Aronson and White v. Jones**, 208 Ala. 104; **Allgood v. Sloss-Sheffield Steel & Iron Co.**, supra.

"Our conclusion is that the justice of the peace has jurisdiction, and that the trial court correctly rules in denying the writ of prohibition."

The premises considered, it is my opinion that these provisions of the 1935 Revenue Act remain in force and undisturbed, and are still applicable to the license on attorneys.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 23, 1939.

Hon. C. E. Carmichael,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Court of County Commissioners—

Individual member without authority to legally employ a person for road work in district for which said commissioner was elected, however, such employment may be made legal so as to bind the county if later ratified by the Court of County Commissioners.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated November 14, 1939, as follows:

"Please advise me whether a member of the Court of County Commissioners of Colbert County has authority to employ a person to do road work such as a foreman, a tractor driver, a truck driver or other road work in the district for which the Commissioner was elected without the concurrence of the Court of County Commissioners prior to the employment.

"In other words is it necessary that the Court of County Commissioners shall pass upon the employment of such county employees for road work before they are legally employed or may one Commissioner make such contract of employment?"

I have carefully examined the local acts dealing with the Court of County Commissioners of Colbert County and am unable to find any provision of law authorizing an individual member of said court to employ workmen to work on the roads in the district for which said commissioner was elected.

Individual members of Courts of County Commissioners and Boards of Revenue have no such authority under the general law.

I refer you, however, to an opinion of this office addressed to the Probate Judge of Jackson County, dated August 22, 1929, Biennial Report of Attorney General, 1928-30, page 591, wherein it was held:

> "Courts of County Commissioners have no authority to pay for supplies purchased by individuals without authority from the Commissioners Court, unless afterwards ratified by said court."

See also opinion to Hon. J. B. Van Valkenburgh, Chairman, Madison County Board of Commissioners, Huntsville, Alabama, Quarterly Report of Attorney General, Vol. IX, page 33.

It will be noted that the above opinions presented questions analogous to the one here under consideration and in view of the holdings, supra, I am of the opinion that if an individual member of the Court of County Commissioners of Colbert County employs a person for road work in the district for which said commissioner was elected, such employment may be made legal so as to bind the county if later ratified by the Court of County Commissioners.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 23, 1939.

Hon. Bart B. Chamberlain, Solicitor,
Thirteenth Judicial Circuit of Alabama,
Mobile, Alabama.

Circuit Solicitors—

Act No. 329, H. 147, approved August 31, 1939, made provision for the State furnishing Circuit Solicitors and their offices with telephone service, stationery, stamps and other necessary equipment, but makes no appropriation from which funds may be obtained to furnish the enumerated articles or items.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of September 11, 1939, in which you request my opinion as follows:

"I have been furnished with a copy of the Act known as House Bill No. 147, and I notice on Page 4 of the same at the end of Section 3, the following:—

"'The several counties of the state are hereby authorized, directed and required to provide suitable offices for the use and occupancy by such solicitors, deputy solicitors, and assistant deputy circuit solicitors in the counties where such officers reside, and the **state** shall furnish such offices and officers with telephone service, stationery, stamps, and other necessary equipment for the use of such officers and offices.'

"You will recall that I wrote you some time ago with reference to the county declining to furnish me with stationery, stamps, supplies and equipment and asking for your opinion. You wrote me to the effect that your opinion was that they had no such authority. I would like to know whether or not, in your opinion, the State is required to furnish me with stationery, stamps, supplies and equipment under this Act. I will appreciate your advising me as soon as you can in order that I may obtain from the State suitable and proper stationery, stamps and other office supplies. If the state is not required, is the County authorized to do so?"

The act to which you refer is Act No. 329, H. 147, approved August 31, 1939. Section 3 thereof provides in pertinent part:

" * * * The State shall furnish such offices and officers (circuit solicitors, deputy circuit solicitors and assistant deputy circuit solicitors) with telephone service, stationery, stamps, and other necessary equipment for the use of such officers and offices."

This proviso of the act would be express legislative authority for the State of Alabama furnishing you the articles or items enumerated therein in the same manner that they are furnished by the State to other State officials, except for the fact that the act contains no appropriation from which funds may be obtained to furnish the enumerated articles or items to the solicitors concerned. Since no appropriation is made for this purpose, I am constrained to hold, under the provisions of Section 72 of the Constitution, as interpreted by the decisions of the courts of this state, that the enumerated articles or items may not now be furnished you and your office by the State of Alabama. See **In re: Opinions of the Justices,** 186 So. 731.

Of course, the failure to make an appropriation for this purpose was no doubt an oversight on the part of the Legislature. It is our information that a bill is still pending in the Senate which, if passed in June when the Legislature reconvenes, will remedy this situation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 23, 1939.

Hon. P. B. Hamilton, Member,
Personnel Board, Mobile County,
Mobile, Alabama.

Officers—Constitutional Law—

Section 280 does not prevent employees of State Department of Revenue from being a member of the Personnel Board of Mobile County.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of November 9, 1939, in which you request my opinion as follows:

"I was employed May 5, 1939 by the State Department of Revenue as Corporation Tax Agent for Mobile County under Section 87 of the 1935 Revenue Act providing for employment of experts, assistants, etc. necessary for the performance of the duties required of the Revenue Department; my compensation was fixed by the Department with the approval of the Governor at $150. per month.

"Recently I was selected by the Citizens Supervisory Committee as member Number One of the Personnel Board for Mobile County under the Mobile County Civil Service Act approved September 15, 1939.

"I would very much appreciate your giving me your opinion as to whether both of the above activities are offices of profit within the purview and meaning of Section 280 of the Constitution of 1901. Please consider in this matter the State Merit System Act and the pay plan therein provided for."

In answer to your inquiry, I call your attention to Section 87 of Act No. 194, H. B. 324, approved July 10, 1935, General Acts, 1935, page 256, which provides as follows:

"Section 87. The State Tax Commission may appoint a secretary at a salary of not more than Two Thousand One Hundred Dollars ($2,100.00) per annum, which salary shall be paid out of the State Treasury in the same manner as the salaries of other State officials are paid. The State Tax Commission may employ such other persons as experts, engineers, stenographers, clerks or assistants as may be necessary for the performance of the duties which may be required of said Commission and said Commission shall fix the compensation of such other persons, with the approval of the Governor, such compensation to be paid out by the State Treasurer out of the appropriation made for the annual expenses of the State Tax Commission, or out of the fund or funds out of which said expenses are properly payable upon warrants drawn by the Comptroller upon said fund or funds."

The functions, powers, authority, and duties of the State Tax Commission were transferred to, and vested in, the State Department of Revenue by the act creating said Department, which is Act No. 4, H. B. 29, approved February 1, 1939.

Section 280 of the Constitution of Alabama, 1901, provides:

"No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars, shall during his continuance in such office hold any office of profit under this State; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this State, except justices of the peace, constables, notaries public and commissioners of deeds."

Section VII of Act No. 470, H. B. 952, approved September 15, 1939, known as the "Mobile County Civil Service Act," provides in pertinent part as follows:

"The members of the Board shall be selected for the following terms and in the following manner; the Citizens Supervisory Committee shall, within thirty days after this Act becomes effective, appoint all three members and shall appoint the successors of said Board Members within thirty days after a term expires or a vacancy occurs. Member Number One who shall be the Chairman of the Board shall hold office for a term of two years beginning on the date this Act becomes effective and until his successor is appointed and has qualified. His successors shall hold office for terms of six years, and first of which shall begin two years after the passage of this Act and the subsequent terms shall begin each six years thereafter. Member Number Two shall hold office for a term of four years beginning on the date this Act becomes effective and until his successor is appointed and has qualified. His successors shall hold office for terms of six years, the first of which shall begin four years after the passage of this Act and the subsequent terms shall begin each six years thereafter. Member Number Three shall hold office for a term of six years beginning on the date this Act becomes effective in said County and until his successor has been appointed and has qualified. His successor shall hold office for terms of six years, the first of which shall begin six years after the passage of this Act and the subsequent terms shall begin each six years thereafter. In the event of a vacancy on the Board occasioned by death, resignation, impeachment or other cause, such vacancy shall be filled by the Citizens Supervisory Committee for the then unexpired term. Each member shall receive ten dollars for each meeting of the Board attended by him, provided no Member shall receive more than Forty Dollars ($40.00) compensation for services during any one month."

This office in an opinion to Messrs. Lucien C. Brown and James A. Lipscomb, Associate Commissioners, Alabama Unemployment Compensation Commission, as of February 8, 1938, Quarterly Report of Attorney General, Vol. X, p. 79, held as follows:

"The Supreme Court of Alabama has on several occasions defined an 'office of profit,' and it has consistently taken the position that unless an appointment conveys, as a necessary incident to its exercise, some part of the sovereign power of the state, the term and salary or pre-

requisites of which are prescribed by law, such appointment is not an 'office of profit' within the purview and meaning of Section 280.

"In the case of State v. Sanders, 187 Alabama 79, 65 Southern 378, the question arose as to whether a state health officer was occupying an office of profit within the meaning of the constitutional prohibitions. The Supreme Court of Alabama held that while the health officer was an officer, it did not follow that he was an officer within the meaning of the constitutional prohibitions. The court said:

" 'The Board of Health may employ the State Health Officer for a day, a week, a month, or a year. The statute does not fix his term of office nor his salary or compensation. It is apparent he is not occupying an office of profit.'

"The Attorney General of the State of Alabama had occasion to rule on the definition of 'office of profit,' in deciding whether an assistant general occupied an office of profit. The Attorney General held the assistant adjutant general was chief clerk and 'in my opinion a chief clerk is not an office of profit within the meaning of Section 280 of the Constitution.' Reports of Attorney General, 1918-1920, page 110.

"In two cases decided by the Supreme Court of Alabama in 1929, State ex rel Horne v. Wilkinson, 124 Southern 213, 220 Alabama 38, and State ex rel Glenn v. Wilkinson, 124 Southern 211, 200 Alabama 172, the Supreme Court set at rest all doubts as to what constitutes an 'office of profit' within the purview of the above mentioned sections of the 1901 Constitution in the 1923 Code of Alabama. In both of the cases mentioned quo warranto proceedings were filed, seeking the ouster of Horace Wilkinson as Assistant City Attorney of Birmingham and as Sheriff's Attorney of Jefferson County, the basis of both actions being that Wilkinson occupied at one and the same time two offices of profit as prohibited by Section 280 of the Constitution. The Supreme Court of Alabama held that the appointment as Sheriff's Attorney was not an 'office of profit' but was employment. The court said:

" 'The sheriff employs the attorney, he is an employee of that official' and again, 'we think it clear that the Assistant City Attorney is an employee and does not hold an office of profit. It is just as plausible to contend that the City Engineer, the Health Officer, or Municipal Surgeon are holding offices of profit under the state.' "

Words and Phrases, Fifth Series, Vol. 4, distinguishes an office and employment as follows:

"Although an office is an 'employment,' it does not follow that every employment is an 'office,' a position, the duties of which are undefined and which can be changed at the will of the superior is not an 'office' but a mere employment and the incumbent is not an 'officer' but a mere employee."

I am of the opinion that the position held as an employee of the State Department of Revenue is not an office of profit within the purview of Section 280 of the Constitution.

I have examined the rules of the State Personnel Board approved September 30, 1939, adopted pursuant to Act No. 480, H. B. 952, approved September 15, 1939, and I find no rule that prohibits an employee of the State Department of Revenue from holding office as a member of the County Personnel Board of Mobile County. Neither do I find any such inhibition in the Merit System Act, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 23, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Licenses—Privilege license issued under subdivision (b) of Schedule 104 of the 1935 Revenue Act cannot be transferred to another person.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for an official opinion bearing date of November 13, 1939. Your request follows:

"Please refer to 1935 Acts, page 557, Sections 349-358 inclusive and advise us whether or not license issued under Schedule 104, Section (b) can be transferred to another person."

In my opinion your question should be answered in the negative. The license acquired under Subsection (b) of Schedule 104 is a personal right to peddle and is not so connected with or coupled with a business that it may be transferred when the business is sold to a new owner. This office has heretofore held that where there is an actual sale of a business to a new owner, the license may be transferred.—Biennial Report of Attorney General 1936-38, page 696; Biennial Report of Attorney General, 1934-36, page 446.

Subsection (b) of Schedule 104 of the 1935 Revenue Act provides as follows:

"(b) Each itinerant vendor or peddler of spices, flavoring extracts, toilet articles, soaps, insecticides, stock and poultry supplies, proprietary medicines and household remedies in original packages and other packaged articles of like kind commonly used on the farm and in the home, who use a motor vehicle solely for the purpose of transporting merchandise from house to house or place to place who do not use such vehicle for the display of merchandise or as a rolling store and who do not permit purchasers or prospective purchasers to enter said vehicle for the purpose

of inspecting or purchasing merchandise shall pay an annual license of Forty Dollars to the State and Forty Dollars to each county in which they do business, provided, however, that those who use a vehicle as herein provided, other than a motor vehicle, shall pay an annual license of Twenty Dollars to the State and Ten Dollars to each county in which they do business, and those who operate without a vehicle of any kind shall pay an annual license of Ten Dollars to the State and Ten Dollars to each county in which they do business."

Section 358 of the 1935 Revenue Act provides as follows:

"Section 358. (a) Every license shall be held to confer a personal privilege to transact the business, employment or profession which may be the subject of the license, and shall not be exercised except by the person, firm, or corporation licensed, unless specifically authorized by law to do so. (b) A business or privilege for which such license is issued is, under actual sale, transferred to a new ownership in which case a transfer of license may be effected by application to the Probate Judge originally issuing such license and the payment of a fee of fifty cents."

In my opinion, although subsection (b), supra, provides that a business or privilege for which such license is issued, under actual sale, can be transferred, the true intention of the Legislature in enacting said section was that the license had to be coupled or connected with a business which could be transferred by sale before it could be transferred.

The license in question, in my opinion, is of a purely personal nature and not subject to transfer. Cf. Biennial Report of Attorney General, 1918-20, page 645; Biennial Report of Attorney General, 1922-24, page 431; Biennial Report of Attorney General, 1928-30, page 371.

The premises considered, it is my opinion that a license issued under subsection (b) of Schedule 104 of the 1935 Revenue Act cannot be transferred to another person.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 23, 1939.

Hon. V. W. Elmore,
Circuit Judge,
24th Judicial Circuit,
Gordo, Alabama.

Court Reporter—Official court reporter authorized to purchase stationery and supplies and counties composing circuit are required to pay for same upon requisition approved by judge of the court.

Counties—Circuit Judge—County governing body not authorized to pay office rent of Circuit Judge, resident in the county, outside county site.

Counties—Circuit Judge—Telephone—County governing body not authorized to pay for telephone in office of Circuit Judge where said office is not in county site.

Counties—Circuit Judges—Stationery—County not authorized to furnish Circuit Judge with stationery.

Court Reporter—Stationery—Court Reporter, when purchasing stationery to be used in his official capacity as such, may have printed thereon both his name and that of the Judge of said court.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated November 6, 1939, which follows:

"I would like to have an opinion from you on the following questions:

"1. Can my official court reporter purchase a typewriter, note book, pen and ink and stationery and the Counties in the Judicial Circuit pay for same?

"2. Can the governing body of a County pay for office rent of the Circuit Judge in the County of his residence outside of the County seat? and whether or not the Circuit Judge can require the County to pay for a telephone rental where the office and telephone will not be in the County seat? and do the Counties of the Judicial Circuit furnish or could they furnish the Circuit Judge his stationery?

"3. Can the Circuit Judge and the Court Reporter have their stationery with both of their names on it and require the Counties to pay for same under Section 6741 of the Code or under any other law that we have?"

A review of the law of this State relative to the office of official court reporter reveals that each Circuit Judge is authorized to appoint a competent shorthand reporter to perform the duties of official court reporter of the courts in the circuit over which said Judge presides. Section 6733, Code of Alabama, 1923; further, that each official court reporter so appointed is furnished with all necessary stationery and supplies necessary to carry out the duties imposed upon him in his official capacity. This is so provided for in Section 6741 of the Code of Alabama, 1923, which is as follows:

"6741. All stationery and supplies to be used by such official or special reporters in their capacity as such shall be **furnished and paid for by the county or counties composing the respective circuits in the manner provided for the payment of the salaries of such official and special reporters on requisition signed and approved by the judge of the court.**" (Emphasis supplied)

It will be observed that the above section provides that an official court reporter must be furnished with all stationery and supplies necessary to carry

out the duties of his office. However, before I can answer your first inquiry it is necessary for me to answer the following questions:

(a) Whether or not an official court reporter can buy necessary stationery and supplies and have the county or counties which compose the judicial circuit for which said reporter is appointed pay for the same?

(b) Whether the words "stationery" and "supplies" as used in Section 6741, supra, include note books, pen and ink, stationery and typewriters?

In my judgment, question (a) hereinabove set out should be answered in the affirmative. It will be noted that Section 6741, supra, provides that all stationery and supplies used by an official court reporter in his capacity as such shall be **furnished** and **paid** for by the county or counties composing the respective circuits in the manner provided for the payment of salaries of such official reporters on requisition signed and approved by the Judge of the court. The manner in which said official court reporter's salary is paid is found in Section 6739, Code of Alabama, 1923, which is as follows:

> "6739. Salary of court reporter.—The official court reporter shall receive a salary of twenty four hundred dollars per year, payable in monthly installments by the counties composing the circuits, each county to pay its prorata of such salary, based upon the assessed taxed valuation of all property of such county for the preceding year, such payment to be made on certificate issued by the judge of the court in favor of such official reporter for the respective amounts due by the several counties each month, the same to be paid by the treasurer of each county out of the general funds thereof on presentation in the same manner as jurors' certificates are now paid."

It will be noted that the above section, supra, provides that the counties composing the judicial circuit for which an official court reporter is appointed are required to pay a pro rata share of such reporter's salary, based upon the assessed tax valuation of all property of such county for the preceding year, such payment to be made by the treasurer of each county composing said circuit upon a certificate issued by the Judge of the court in favor of such court reporter. Therefore, reading the above provision into Section 6741, supra, as is required by the provisions of the latter section, it can be seen that the counties composing the judicial circuit for which an official court reporter is appointed must pay a pro rata share of the cost of all stationery or supplies used by said reporter in his official capacity as such, upon requisition signed and approved by the Judge of the court. If, therefore, follows, and is my opinion, that an official court reporter can buy, subject to the approval of the Judge, all stationery and supplies used in his official capacity, and the counties of the circuit must pay for same as heretofore set out, when presented with requisition signed and approved by the Judge of the court.

It is also my judgment that question (b) heretofore set out should be answered in the affirmative. The word "stationery" has been held to include paper, ink, pens, blank books and typewriters. See **Crook v. Commissioners' Court of Calhoun County,** 144 Ala. 505, 39 So. 383; **Underwood Typewriter Co. v. Marengo County Bank,** 203 Ala. 128, 82 So. 158. The above cases take care of all items mentioned by you. However, I call attention to the fact that only typewriters, note books, pen, ink and stationery used by the official court reporter in his capacity as such are chargeable against the county or counties composing the judicial circuit.

It therefore follows that your first inquiry should be answered in the affirmative, subject to the conditions set forth in this opinion.

Your second inquiry presents three independent and distinct questions, namely:

(1) Can the governing body of a county pay for office rent of the Circuit Judge in the County of his residence outside of the County seat?

(2) Whether or not the Circuit Judge can require the County to pay for a telephone rental where the office and telephone will not be in the County seat?

(3) Do the counties of the Judicial Circuit furnish or could they furnish the Circuit Judge his stationery?

It is my opinion question (1) heretofore set out should be answered in the negative. In an opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, under date of January 21, 1927 (Biennial Report of Attorney General, 1926-28, p. 67) it was held that there was no authority of law for a county to pay the office rent of either a Circuit Judge or a Circuit Solicitor, resident in the county, where there was no suitable space for them in the courthouse. At the time of the rendition of this opinion, Section 6755, Subdivision (1) of the Code of Alabama, 1923, which is the section detailing the authority of the county governing body in such respect, appeared as follows:

"6755. Authority of court.—The court has authority—

"(1) To direct and control the property of the county as it may deem expedient according to law, and in this direction and control it has the sole power to locate the courts in the rooms of the courthouse and to designate the rooms to be occupied by the different officers entitled to rooms therein, and to change the location of the courts, and the designation of rooms for officers, as it may deem best and most expedient, and this shall be done by order of the court entered upon its minutes at a regular term of the court."

Shortly after the rendition of the above referred to opinion, Subdivision (1) of Section 6755 of the Code of Alabama, 1923, was amended by Act No. 75, H. B. 150, approved February 18, 1927 (General Acts, 1927, p. 57) to read as follows:

"1. To direct and control the property of the County as it may deem expedient according to law, and in this direction and control it has the sole power to locate the courts in the rooms of the courthouse and to designate the rooms to be occupied by the officers entitled to rooms therein, **including the circuit judge, if resident in the county,** and to change the location of the courts, and the designation of the rooms for officers, as it may deem best and most expedient, and this shall be done by order of the court entered upon the minutes of the court at a regular term of court. **In the event the courthouse is inadequate to supply office rooms for such officers, the court may lease such office rooms in a convenient location in the county site and to pay the rental from the county funds.**" (Emphasis supplied)

It will be noted that Subdivision (1) of Section 6755, supra, was amended, supra, so as to make specific provision for Circuit Judges, if resident in the county, and further by adding thereto the following sentence:

> "In the event the courthouse is inadequate to supply office rooms for such officers, the court may lease such office rooms in a convenient location in the county site and to pay the rental from the county funds."

In my opinion, the effect of said amendment, supra, is to allow a county governing body to pay the office rent of a Circuit Judge, resident in the county, when the courthouse is inadequate to supply office rooms for such officer. This was impliedly held by this office in an opinion to Hon. J. N. Mullins, Solicitor, Twentieth Judicial Circuit, Dothan, Alabama, under date of April 8, 1927 (Biennial Report of Attorney General, 1926-28, page 159). However, under the express terms of Subdivision (1) of Section 6755 the office rented for a Circuit Judge, resident in the county, by a county governing body when the courthouse is inadequate to supply such officer with office rooms, must be located in the county site.

It is my opinion that question (2) heretofore set out should be answered in the negative. Act No. 187, S. 199, Extra Session, 1933, p. 201, provides as follows:

> "That Boards of Revenue or Courts of County Commissioners may designate which offices in the court house may have telephones installed therein."

This office has heretofore held, in construing the above act, supra, that a county is authorized to furnish a telephone for a solicitor where he maintains an office outside of the courthouse because of the crowded condition therein. Opinion to Hon. Bart B. Chamberlain, Circuit Solicitor, Mobile County, Mobile, Alabama, dated August 18, 1938, Quarterly Report of Attorney General, Vol. XII, p. 130, and opinion to Hon. Chas. W. Lee, State Comptroller, Capitol, dated July 16, 1938, Quarterly Report of Attorney General, Vol. XII, p. 62. Applying the construction heretofore placed upon said act, supra, to the question at hand, it is my opinion that a county governing body is authorized to furnish a telephone for a Circuit Judge, resident in the county, where his office is located outside of the courthouse because of crowded conditions therein. However, as pointed out in answer to question (1) a county governing body cannot maintain an office for a Circuit Judge, resident in the county, outside the county site and, therefore, in my opinion, would not be authorized to furnish him a telephone for an office located outside the county site.

In my opinion, question (3) heretofore set out should be answered in the negative.

I know of no provision of law which authorizes a county governing body to furnish a Circuit Judge with stationery. Section 9604 of Michie's Code of 1928, designates the officers furnished stationery by a county but the office of Circuit Judge is not included. See opinion of this office to Hon. W. H. Hines, Commissioner, Dist. No. 3, Monroe County, Monroeville, Alabama, dated September 20, 1939, Quarterly Report of Attorney General, Vol. XVI, p. 261.

In answer to your third inquiry, I point out that in answer to your first inquiry it was held that an official court reporter is furnished with all stationery used in his official capacity as such and the same is paid for by the county or counties composing the judicial circuit for which said reporter is appointed. I also call attention to the fact that it was held in answer to question (3), supra, that a county governing body is not authorized to furnish a Circuit Judge with stationery. However, I know of no provision of law which would prevent an official court reporter, when purchasing stationery to be used in his official capacity, as such, from having his name and that of the Judge of said court printed thereon.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 23, 1939.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
State of Alabama,
State Capitol.

Bonds—Justices of the Peace—Court of County Commissioners, Board of Revenue or like County Governing Body have authority under Act No. 191, H. 344, approved April 20, 1933 (General Acts of 1933, Extra Session, page 203) to require a Justice of the Peace to make an additional bond above $1000 and in such an amount as may be determined by said governing body.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for official opinion dated November 9, 1939, reads as follows:

"Please refer to House Bill 344, by Mr. Baines, page 203, General Acts of 1933, Extra Session, and particularly to Sections 14 and 16 of this Act, and advise me in answer to the following:

"1. Has the Court of County Commissioners, Board of Revenue, or like governing body the authority to require a Justice of the Peace to make an additional bond above One Thousand Dollars ($1,000), and in such an amount as may be determined by said governing body?"

In my opinion your question should be answered in the affirmative. Sections 3, 14 and 16 of Act No. 191, H. 344, approved April 20, 1933 (General Acts of 1933, Extra Session, page 203), provide respectively as follows:

"Section 3. The Court of County Commissioners, Boards of Revenue or other like governing bodies of the respective counties are hereby au-

thorized and empowered to fix and approve the official bonds of all other county officials and employees, and clerks, deputies and employees in county offices in such an amount or amounts as may in their judgment be necessary for the safety and security of public funds or other funds and as the public interest may demand subject **to such limitations as are specifically provided herein and made applicable to each particular county official.**"

"Section 14. The official **bonds of Justices of the Peace,** Notaries Public, Constables and **County Surveyors** shall be, as to each officer, in the sum of $1000.00 the premiums on said bonds to be paid by the person making such bond and without expense to the County."

"16. That when in the judgment of the Court of County Commissioners, Board of Revenue or like County governing body of any County any bond provided for in this Act is insufficient either as to the penalty or the surety to fully protect the public interests and safeguard the public funds such governing body may require such officer to make an additional bond in such amount and with such sureties as may be approved by said governing body; provided the foregoing shall not apply to the County Superintendent of Education or the County Treasurer of public school funds, but when in the judgment of the County School Board the bond of the Superintendent of Education or the County Treasurer of Public school funds of said county is insufficient either in penalty or surety to fully safeguard the public school funds, such County school Board shall require such officer to make additional bonds in such amounts and with such sureties as may be approved by said Board."

The provisions of Section 16, supra, are very plain and unambiguous and the only bonds exempted from regulation by the County governing body under this Act are the bonds of the County Superintendent of Education and the County Treasurer of school fund. This section, in my judgment, is cumulative of the other provisions of the Act.

The premises considered, it is, therefore, my opinion that the Court of County Commissioners, Boards of Revenue or like County Governing Body have authority under Act No. 191, H. 344, approved April 20, 1933 (General Acts of 1933, Extra Session, page 203), to require a Justice of the Peace to make an additional bond above $1000 and in such an amount as may be determined by said governing body, when in its judgment the public interest justifies same.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 24, 1939.

Hon. Thomas W. Coleman,
Judge of Probate,
Calhoun County,
Anniston, Alabama.

Licenses—Transient dealers—Party buying cattle, having them slaughtered, and subsequently selling the meat to meat markets and dealers for resale without having a permanent place of business held liable for transient dealer's license.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of November 10, 1939, in which you request my opinion as follows:

"Will you please advise me if license as transient dealer is required of a party who buys cattle and has them slaughtered at a slaughter-house in Anniston, and sells the meat, after being butchered, to the meat markets and dealers?"

I am assuming for the purposes of this opinion that the party concerning whom you inquire has no permanent place of business within the meaning of Schedule 147 of the 1935 Revenue Act. It is my opinion that the party mentioned in your inquiry is liable for a transient dealer's license as levied by said Schedule 147.

The pertinent provisions of Schedule 147 are as follows:

"Each person doing business as a transient dealer as defined in this schedule * * * shall pay an annual license tax to the State of $30.00. The payment of one State license shall authorize such transient dealer to engage in such business in any county in the State upon the payment of a county license of $5.00 in each such county. Definition of transient vendor or dealer: (a) When used in this section, the words 'transient dealer' shall be held to include any person or persons who shall be embraced in any of the following classifications: (b) All persons acting for themselves or as an agent, employee, salesman, or in any capacity for another, whether as owner, bailee or other custodian of goods, wares, and merchandise, and going from person to person, dealer to dealer, house to house, or place to place, and selling or offering to sell, exchanging or offering to exchange, for resale by a retailer, any goods, wares and merchandise, * * *."

Under the facts which you have stated, it readily appears that the party mentioned comes within the purview of Subsection (b) of Schedule 147, supra, in that, acting for himself, he goes from person to person or dealer to dealer and sells, or offers to sell, for resale by such dealer, goods, wares and merchandise. There can be no doubt that the words "goods, wares and merchandise" include meat as sold by the party concerning whom you inquire. See **City of Pittsburgh v. Kalchthaler**, 114 Pa. 547, 7 Atl. 921, 922.

While Schedule 147, provides for certain exemptions from the license levied thereby, none of these apply to the business activities which you describe. Nor could the fact, if it be so, that this party has acquired a license under Act No. 190, H. B. 106, approved April 21, 1936, (General Acts, 1936, Extra Session, p. 222) relieve him of the necessity of obtaining license required by Schedule 147. Section 8 of Act No. 190 specifically provides that the payment of the permit provided for by that act shall be in addition to any license or licenses now or hereafter required to be paid to the State of Alabama or any county.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

November 24, 1939.

Hon. I. C. Heck,
State Comptroller,
Capitol.

Statutes—Municipalities—

In determining the distribution of the monies made available to the heretofore incorporated municipalities of the State by Act No. 401, H. 886, approved September 15, 1939, and Act No. 510, H. 782, approved September 19, 1939, the population of each such municipality according to the Federal Census of 1930 should be used, where there was a Federal Census taken in such municipality in 1930, but where the municipality was incorporated since 1930 and there was no Federal Census taken in such municipality in 1930, the population of such municipality at the time of its incorporation, determined in accordance with the provisions of Section 1747 of the Code of Alabama, 1923, should be used.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have a letter from Hon. Ed E. Reid, Executive Secretary, Alabama League of Municipalities, Montgomery, Alabama, under date of November 20, 1939, in which my opinion is requested as follows:

"There was passed by the Legislature of 1939 Act No. 401, which was approved by the Governor on September 15 providing for the distribution of certain liquor store proceeds among the several incorporated cities and towns of the state. The act provides for the apportionment of the funds to 'the several heretofore incorporated cities and towns in the state semi-annually on the basis of the ratio of the population of each such city or town to the total population of all cities and towns, **according to the last Federal Census . . .** '

"It was the intention of us who drafted this legislation to guard against local communities which are interested in incorporating only for the purpose of receiving such funds as are apportioned among the municipalities by the state being able to incorporate purely for the purpose of obtaining the revenues available under this piece of legislation. It was for this reason that the word 'heretofore' was inserted immediately preceding the reference to incorporated cities and towns in the act.

"Since the act provides for the apportionment of funds on the basis of population as shown by 'the last Federal Census,' the question now confronts us as to what population basis shall be used in apportioning funds to the municipalities that have been incorporated since the making of the last Federal Census report, but prior to the passage of the act. These municipalities do not have a Federal Census. At the time they were incorporated they filed with the Probate Judge of the county population information. I am wondering if the population figures filed by the newly incorporated municipalities are adequate and proper for use by the official distributing the municipal funds made available by Act No. 401, Acts of the 1939 Session of the Legislature.

"The same set of facts presented above is applicable to Act No. 510, Acts of the 1939 Session of the Legislature, approved September 19, which act relates to the distribution of a certain portion of the State-collected gasoline tax on the several incorporated municipalities.

"Your opinion on this question will be very much appreciated."

Since you are the official charged by law with the duty of issuing State warrants to the various municipalities of the State for the amounts to which they are respectively entitled under the provisions of the statutes referred to in his letter of inquiry and have made known to me your desire for advice in the premises, my opinion in answer to his request is addressed to you.

The acts referred to in the request for opinion are Act No. 401, H. 886, approved September 15, 1939, and Act No. 510, H. 782, approved September 19, 1939. These acts provide, respectively, for the distribution of a portion of the profits of the State Liquor Stores and of the proceeds from the State Gasoline Tax to the various municipalities of the State which were incorporated prior to the passage of the acts. On the subject of the distribution of the funds thereby made available to the various municipalities of the State, the acts provide, respectively, in pertinent part:

"* * * Such excess * * * shall be apportioned among, and paid to, the several heretofore incorporated cities and towns in the State semi-annually on the basis of the ratio of the population of each such city or town to the total population of all cities and towns, according to the last Federal Census * * *."

"* * * Said fund shall be semi-annually apportioned among, and paid to, the said several incorporated cities and towns in the State (that is, those heretofore incorporated) on the basis of the ratio of the population of each such city or town to the total population of all such cities and towns, according to the last Federal Census * * *."

In my judgment, in determining the distribution of the monies made available by the acts, supra, to the various municipalities of the State, you

should use the population of the various municipalities according to the Federal Census of 1930 (which was the last Federal Census) in all instances where a Federal Census was taken in 1930, and in those instances where the municipality was incorporated since 1930 and there was no Federal Census taken therein in 1930, you should use the population at the time of incorporation, which was determined in accordance with the provisions of Section 1747 of the Code of Alabama, 1923, which is a part of Article 2 of Chapter 43 of the Code of Alabama, 1923, dealing with the incorporation of municipalities. Said section reads as follows:

> "Section 1747. Census enumeration of inhabitants.—Within five days after the election, the inspectors must certify the result to the judge of probate, who must, if a majority of the votes cast at the election are for 'corporation' cause an enumeration of the inhabitants residing within such territory to be made by such inspectors, or other persons appointed by him, and, within three days after such enumeration has been completed and returned to him, shall make an order to be entered of record in the minutes of the court, that the inhabitants of such territory are incorporated as a town or city, as the case may be, by the name and with the boundaries shown by the petition; thereupon such town or city shall be vested with the rights and powers herein granted, incident to such corporations."

I do not think it could be said that the Legislature in making these funds available to the various municipalities of the State intended by the use of the language above quoted from the acts, supra, which made the funds available, to exclude from participation in the funds thereby made available to the various municipalities of the State, those municipalities that were incorporated since 1930 and where no Federal Census was taken in 1930. Had the Legislature seen fit to limit participation in these funds to those municipalities incorporated prior to 1930, it would have been a simple matter for it to have done so. To my mind, the fact that the Legislature did exclude from participation in these funds all municipalities which might be incorporated subsequent to the passage of the acts making the funds available by the use of the words "heretofore incorporated" in both acts to modify the word "municipalities" as used therein negatives the idea that they intended to exclude from participation therein any municipalities incorporated prior to the passage of the acts. The evident purpose of the language in the quoted excerpts from the acts, supra, was to make certain that which might be otherwise uncertain, i. e., that the last Federal Census should be the basis for determining the population, taking precedence over any other census, only in those instances where there was such a Federal Census taken.

Apt authority for the view here expressed is found in the opinion of the Court of Appeals, written by Presiding Judge Bricken, in the case of **State v. H. G. Fain Service Station,** 23 Ala. App. 239, 124 So. 119, certiorari denied by the Supreme Court 220 Ala. 55, 124 So. 121, from which we quote:

> "The state cites section 377 of the Revenue Act of 1919 (p. 445), providing that, where the amount of license is rated according to population, the population as fixed by the last preceding United States census shall govern. It is insisted that since the last census does not enumerate the city of Homewood, and since Homewood came into existence as a corporate entity subsequent to such census, it has, for the purpose of section 20 of the 1927 act, no population, and, hence, that the Birmingham rate must be applied in this case. We cannot accede to this insistence. The evident purpose of section 377 was to make certain that which might

be otherwise uncertain; that the United States census should be the basis for determining population taking precedence over any other census. See Ex parte Jones, 212 Ala. 259, 102 So. 234. In other words, the section could only mean where there is such a census taken by the United States. No such census having been taken, of necessity, the actual population must apply. To hold that, for the purposes of a taxation statute, where there was no federal census there is no population, would lead to at least a partial defeat of such taxation statute. For example, suppose the creation of a populous municipality subsequent to a federal census, situated more than five miles from any other incorporated municipality, could it be logically held that such municipality had no population, and that the fortunate citizens thereof should enjoy the low rates, or the exemption from rates, that would apply to rural communities? The question answers itself. And further, suppose the five-mile limit from Birmingham extended into only a portion of the territory of the city of Homewood, and that the remaining portion of said city was not within said limit. If the state's contention here should prevail, the anomalous condition would be presented that within the said city of Homewood two separate and distinct rates upon gasoline filling stations would apply, and those within the five-mile limit must pay the high rate, and the filling stations just beyond but not within the five-mile limit the low rate, yet both stations are within the same city. This we do not think was contemplated by the Legislature in the passage of this act."

The premises considered, you are advised that in determining the distribution of the monies made available to the various municipalities of the State by the acts, supra, you should use the population according to the Federal Census of 1930 in all instances where a Federal Census was taken in 1930, and in all instances where the municipality was incorporated since 1930 and no Federal Census was taken in 1930, you should use the population as determined by the census taken at the time of incorporation in accordance with the provisions of Section 1747, supra.

Yours very truly,

THOMAS S. LAWSON.

Attorney General.

November 24, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Filing Tax—The recording of an assignment or transfer of a mortgage, upon which no mortgage tax has been paid, is subject to a deed filing tax as provided by Schedule 46 of Section 348 of the Revenue Act of 1935 if same conveys an interest in property. The fact that the transferee or assignee of the mortgage satisfies said mortgage on the record before the filing of the transfer or assignment is immaterial as the filing tax is based on the value of the interest conveyed at the time of execution rather than the date of recordation.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of October 16, 1939, in which you request my opinion as follows:

> "In May, 1932, M. J. and W. Y. Williams executed a mortgage to E. L. Clark, which mortgage was filed for record and the tax on same was paid. In July, 1934, M. J. and W. Y. Williams executed a mortgage to the Home Owners Loan Corp. to take up the original mortgage to E. L. Clark on which no payments had been made and of course no filing tax was paid as the HOLC are exempt. In July, 1939, a transfer dated May 12, 1939, from the HOLC to E. L. Clark of the mortgage given to HOLC above was presented by Mr. Clark for record and at the same time Mr. Clark presented a mortgage from M. J. and W. Y. Williams covering the original mortgage and additional advances for record and the tax on same was paid at that time on the mortgage from Williams to Clark. All of the above transactions covered the same property and no payments were made by Williams to either Clark or HOLC on the principal mortgage. Should we collect deed tax on the transfer from HOLC to E. L. Clark? Mr. Clark paid the HOLC mortgage out of the amount secured by the last mortgage from Williams to him. If the mortgage transferred from HOLC to Clark is marked satisfied on the record by Mr. Clark will the transfer to Clark be taxable? Mr. Clark actually paid the mortgage from Williams to HOLC and they transferred same to him so that the records could be cleared and this amount was included in the last mortgage to Mr. Clarke and the tax thereon paid.
>
> "Your opinion on this matter will be greatly appreciated."

The answer to your first inquiry depends upon whether or not the assignment or transfer of the mortgage from the Home Owners Loan Corporation, which mortgage was given by M. J. and W. Y. Williams to the Home Owners Loan Corporation, to E. L. Clark conveyed an interest in the property in question.

The recording of an assignment or transfer of a mortgage, on which no mortgage tax has been paid, is subject to the deed tax as provided by Schedule 46, Section 348, of the Revenue Act of 1935.—**Quarterly Report of the Attorney General, Vol. XV,** page 229; **Biennial Report of the Attorney General, 1936-38,** page 729; **Biennial Report of the Attorney General, 1932-34,** page 804. This tax is measured by the interest conveyed.

The filing tax is based on the value of the interest conveyed at the date of the execution of the instrument rather than the date of recordation.—**Quarterly Report of the Attorney General, Vol XIV,** page 183.

Applying the above to the instant case, it follows that if the assignment or transfer of the mortgage from the Williams' to the Home Owners Loan Corporation to Clark conveyed any interest in the property the deed tax would be chargeable on recordation as the mortgage tax had not been paid on said mortgage. On the other hand, if it did not convey any interest, no tax would be due. If the assignment or transfer in question was executed prior to the last mortgage from Williams' to Clark it conveyed an interest in the property and would be subject to the deed filing tax upon recordation. The

fact that the Williams' may have subsequently executed a mortgage covering the same property to Clark after the transfer would not affect the value of the interest conveyed by the transfer. However, if the last mortgage from the Williams' to Clark was executed before the assignment or transfer and the mortgage from the Williams' to the Home Owners Loan Corporation paid, then the transfer of the mortgage of the Williams' to the Home Owners Loan Corporation to Clark would not convey any interest in the property, the same being given to clear the title; and, therefore, would not be subject to the filing tax upon recordation.

In answer to your second inquiry, it is my opinion that it is immaterial if the mortgage transfer from the Home Owners Loan Corporation to Clark is marked satisfied on the record. This would not affect the question of whether or not the assignment or transfer is taxable. As above stated, the filing tax is based on the value of the interest conveyed at the date of execution of the instrument rather than the date of recordation.—**Quarterly Report of the Attorney General,** Vol. XIV, page 183, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 24, 1939.

Hon. John C. Curry, Commissioner,
Department of Revenue,
Capitol.

Licenses—Under Schedule 43 of the 1935 Revenue Act, each person whose principal business is buying cotton should pay only one State license of $25.00 and a county license of $10.00 in each county in which he maintains an office or buys cotton.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion dated November 9, 1939, which reads as follows:

"Re: Schedule 43—Revenue Act of 1935.

"Under this Schedule would a person whose principal business is buying cotton be required to pay a State license of $25.00 and a County license of $12.50 in the first County in which they engage in such business?

"Would the person who has procured the license as set out in the above paragraph be required to procure the State license of $10.00 and a County license of $5.00 in each additional County in which they bought cotton?"

In my opinion your questions should be answered in the negative.

Schedule 43 of the 1935 Revenue Act provides as follows:

"Schedule 43. Each person whose principal business is BUYING COTTON, shall pay one State license of twenty-five dollars ($25.00), and shall also pay a license of ten dollars ($10.00), in each county in which such person shall maintain an office or buy cotton."

It will be noted that under the above quoted license schedule the license is not on the principal place of business but on each person whose principal business is buying cotton. It will be noted further from said schedule that only one State license is required. This being true, it follows that the $10.00 license therein set out is the county license to be paid in each county in which an office is maintained or cotton is bought.

Subsection (a) of Section 350 of the 1935 Revenue Act provides that whenever a license is levied under this Act, there shall be collected both a State and a county license for each place of business, "except as specifically otherwise provided."

Subsection (b) of said Section 350 levies a county license of fifty percent of the State license "except as herein otherwise provided." In my opinion the specific terms of Schedule 43, supra, govern over these general provisions.

It is, therefore, my opinion that under Schedule 43, supra, of the 1935 Revenue Act each person whose principal business is buying cotton should pay only one State license of $25.00 and a county license of $10.00 in each county in which he maintains an office or buys cotton.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 28 1939.

Hon. Frank M. Stewart,
Executive Secretary,
Alabama State Milk Control Board,
Montgomery, Alabama.

Alabama Milk Control Board—Enjoining Licensees—

1. Alabama Milk Control Board does not have authority to fix the prices of the sale of milk in the United States Marine Hospital.

2. The United States Marine Hospital is an agency of the Federal Government on territory ceded to the Federal Government within the purview of Article 1, Section 8, Clause 17, of the Constitution of the United States and Section 1505 of the Code of 1923.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of October 25, 1939, requesting my opinion as follows.

"On June 27, 1939 I requested the opinion of your Department as to the right of the Alabama State Milk Control Board to enjoin a licensee under the Alabama State Milk Control Law from selling or offering to sell milk at prices less than the minimum prices fixed by said Board to Fort McClellan or any other Agency of the Federal Government located within a duly designated milk shed within the State of Alabama.

"I have before me a copy of your opinion addressed to me under date of August 14, 1939.

"In this connection I should like to point out to you the fact that we have three licensees in the Mobile Milk Shed selling milk to the United States Marine Hospital under written contracts executed upon the premises of the United States Marine Hospital, such contracts calling for the sale of milk to the Marine Hospital at prices less than those fixed by the Milk Control Board.

"In order to clear up certain doubts in our minds as to our rights to enjoin the above mentioned licensees, I propound to you the following inquiry:

"Can the Alabama State Milk Control Board enjoin a licensee under the Alabama State Milk Control Law from selling or offering to sell milk at prices less than the minimum prices fixed by said Board to the United States Marine Hospital, Mobile, Alabama?

"If you reach the same conclusion with reference to the United States Marine Hospital as you did in your opinion of August 14, no new opinion will be necessary."

The question which you present to us for consideration is quite similar to that propounded by you recently and answered by us in our opinion to you under date of August 14, 1939, found on page 158 of Vol. XVI of the Quarterly Report of the Attorney General. However, we can readily see how this subsequent question would arise. Our initial opinion being quite exhaustive, permit me to quote the crux of same for the basis of our opinion here:

" * * * You are advised that it is not within the power of the Alabama Milk Control Board to enjoin a licensee under the Alabama State Milk Control Law from selling or offering to sell milk at prices less than the minimum price fixed by said Board at Fort McClellan or any other agency of the Federal Government located within territory ceded to the United States for one or more of the purposes enumerated in Article 1, Section 8, Clause 17 of the Constitution of the United States."

The readily perceivable questions arising from this conclusion in a subsequent statement of facts are (to be specific as to the subsequent statement of facts): (1) Is the Marine Hospital one of the purposes enumerated in

Article 1, Section 8, Clause 17 of the Constitution of the United States? (2) Is the Marine Hospital on territory ceded to the United States?

The purposes enumerated in the pertinent section of the United States Constitution are: (1) erection of forts, (2) magazines, (3) arsenals and dock-yards, (4) and other needful public buildings. These purposes are adopted in our Section 1505 of the Code of Alabama, 1923, and even here stated more emphatically and broader when it says, " * * * or public buldings of any kind whatever."

It does not appear to me to be necessary to give authorities saying that a United States Marine Hospital is within the meaning of "public buildings of any kind whatever", or "needful public buildings". Therefore, we can assume without fear of contradiction, I believe, that a United States Marine Hospital is within the purview of Section 8, Clause 17, Article 1 of the United States Constitution, and Section 1505 of the Code of 1923.

We are now confronted with question 2 above. Is the Marine Hospital on territory that has been ceded to the Federal Government Section 1505 of the Code of Alabama, 1923, reads as follows:

> "1505. Cession of certain lands to United States.—The state of Alabama has ceded to the United States of America jurisdiction over all lands which have been or may hereafter be purchased or otherwise acquired by the said United States in the state of Alabama, for the purpose of erecting thereon any armory, arsenal, fort, fortification, navy yard, custom house, light house, post-office, or public building of any kind whatever, and the legislature of the State of Alabama has consented to all such purchases or acquisitions by said United States of America."

This Code section clearly states that such territory has been ceded to the Federal Government by saying, "all lands which have now or may hereafter be purchased or acquired in any other manner,"—there is no way the Federal Government could get this property without coming within the purview of this Code section.

From a reading of the case of **Webb v. White Engineering Co.**, 204 Ala. 429, it is apparent that when the Federal Government acquires land in Alabama for one of the purposes enumerated in Section 1505, supra, and paragraph 17, supra, it acquires ipso facto "exclusive legislation". Therefore, we do not believe that there can be any question but that the State of Alabama has relinquished its right to regulate in this particular the price of the sale of milk on such territory.

In addition to the authorities cited to you in our recent opinion, supra, let me call your attention also to the opinion to Hon. Ed Pettus under date of September 27, 1938, found on page 202, Vol. XII, Quarterly Report of the Attorney General, and the numerous authorities cited therein, and the case of **State v. Blair** (Ala. Sup. Ct.), 191 So. 237.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 29, 1939.

Hon. M. E. Cannon, Treasurer,
Court of County Commissioners,
Covington County,
Andalusia, Alabama.

Counties—County Board of Equalization—

County governing body held not authorized to pay for advertisement of list of items of personal property exempt from taxation and those subject to taxation, which list was published by the County Board of Equalization.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of November 9, 1939, in which you request my opinion as follows:

"The Covington County Tax Equalization Board ran an advertisement in each of the two Andalusia papers at an expense of Ten Dollars each. A copy of this advertisement is attached hereto. The Equalization Board has asked the County to pay this item of Twenty Dollars. The County is willing to pay for the advertisements if in your opinion payment can be legally made.

"The Court of County Commissioners will greatly appreciate it if you will favor them with your opinion as to whether this payment can be legally made by the County."

In my opinion, there is no authority for the county to pay for such advertising.

The advertisement enclosed in your letter is mainly a list of items of personal property exempt from taxation and those subject to taxation.

This notice to the taxpayers is no doubt a great help to them and of great public benefit. However, I am unable to find any provision of law authorizing the County Board of Equalization to publish such notice and no authority for the county to pay for same.

I call your attention to an opinion of this office rendered to Hon. Alex Brantley, Chairman, Board of County Commissioners, Pike County, Troy, Alabama, on October 21, 1939, which deals with an analogous situation, a copy of which is enclosed.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

OVERRULED—DO NOT FOLLOW

November 29, 1939.

Hon. J. D. Henry, Chairman,
Board of Revenue,
Calhoun County,
Anniston, Alabama.

Counties—Board of Revenue of Calhoun County does not have authority to pay the premium on the bond of the County Engineer.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion dated November 22, 1939, which reads as follows:

"At the last session of the Legislature there was passed an Act establishing the Office of Road Engineer for Calhoun County. Section five of the said Act reads as follows:

" 'The board of revenue or other like governing body of said county shall require the said engineer to execute a bond with surety to be approved by said board payable to Calhoun County in a penalty not to exceed five thousand dollars for the faithful performance of his duties and for the faithful accounting of all moneys or property of said county which may come into his possession.'

"Please advise if we can legally pay the premium on the bond of the Road Engineer as required in the above quoted section. If we do have the authority to pay the premium should it be paid from the general fund of the county or from the road funds of the county?"

In my opinion, your first question should be answered in the negative. Section 5 of Act No. 421, S. 388, approved September 13, 1939 (Local Acts 1939 MS) provides as follows:

"Section 5. The board of revenue or other like governing body of said county shall require the said engineer to execute a bond with surety to be approved by said board payable to Calhoun County, in a penalty not to exceed five thousand dollars for the faithful performance of his duties and for the faithful accounting of all moneys or property of said county which may come into his possession."

I have carefully examined Act No. 421, supra, and there is no provision therein for the payment of the premium on the engineer's bonds. Therefore, it is my opinion that it was the intention of the Legislature, that the premium should be paid by the individual and not the county.

"The fundamental rule of construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute." Alabama-Southern Digest, Vol. 25, Statutes, Key No. 181 and cases cited thereunder.

I know of no provision of law either expressed or implied, in the general laws of this State, which authorizes such an expenditure by the county. In my opinion, Act No. 191, H. 344, approved April 20, 1933, (General Acts, 1933, p. 203), dealing with the bonds of county officials generally, has no application.

The policy long adopted in this State is that a county can incur no liability, make no contracts, nor do any act, regardlses of the benefits that might be derived thereby, unless the power to do so is derived either from an express authorization of the law, or by necessary implication. It has no powers except those which are necessary to the performance of the governmental functions imposed on it.—**Mobile v. Drago,** 172 Ala. 155, 54 So. 995; **Naftel v. Montgomery County,** 127 Ala. 562, 29 So. 29; **Jack v. Moore,** 66 Ala. 184; Opinion of this office to Hon. T. C. Garner, Treasurer. Jefferson County, Birmingham, Alabama, dated November 9, 1939, Office Edition Book 7B; Quarterly Report of Attorney General, Vol. IX, page 35; Quarterly Report of Attorney General, Vol. XI, page 146.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 29, 1939.

Hon. D. Hardy Riddle,
Judge of Probate,
Talladega County,
Talladega, Alabama.

Counties—

Counties have authority to defray expenses of maintaining a W.P.A. office. Said expenses may be paid from the general fund generally; and from the road and bridge fund when same are for the exclusive benefit of the construction, maintenance and repair of roads and bridges within the county.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of November 15, 1939, in which you request my opinion as follows:

"We have several road projects pending wherein we are assisted by W. P. A. and it has been suggested that our Commissioners Court help defray the expense of maintaining the W. P. A. Area office in Gadsden.

"Every project that we have is a road project and I am writing to ask your official opinion upon following questions.

"1st: Can we pay money out of the Road Fund of Talladega County to the City of Gadsden to help defray the expense of a W. P. A. office and charge it to one or more projects in our County?

"2nd: Can we legally pay this money out of any funds when it is to be used wholly to support the district office of a Federal Agency?"

The purpose of the W. P. A. is to provide relief and work relief, and to increase employment by providing for useful projects (U. S. Government Manual, page 339). Former opinions of this office hold that counties have the authority to expend their funds for the aid in the promotion of Federal Relief Projects in the counties.

Biennial Report of the Attorney General, 1934-36, page 661;

Quarterly Report of the Attorney General, Vol. X, page 132;

Quarterly Report of Attorney General, Vol. IX, page 93;

Biennial Report of the Attorney General, 1932-34, pages 595 and 629.

It therefore follows that since the purpose of the W. P. A. is to provide relief and work relief and to increase employment, that the expenses in question come within the purview of the above cited opinions and the county has the authority to pay for same.

The payment may be made out of the road and bridge fund provided that the effect of paying the expenses in question is for the exclusive benefit of the construction, maintenance and repair of public roads and bridges within the county.—Biennial Report of the Attorney General, 1932-34, page 629, supra. I wish to call your attention to Section 161 of the Highway Act of 1927 (General Acts, 1937, page 392), as same appears in Michie's Code of 1928 as Section 1937 (115), which authorizes the commissioners court to transfer to the road fund money from the general fund, provided there is a surplus in such general fund. (See Biennial Report of Attorney General, 1936-38, page 472.)

The expenses in question may be paid out of the general fund under the authority of Section 6755(6), Code of Alabama, 1923, as amended by Acts 1931, page 759, relative to the authority of the county governing body to make such rules and regulations for the support of the poor in the county as are not inconsistent with the laws of the State.

I have not answered your questions categorically, but the above will give you the information which you desire.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 29, 1939.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Department of Finance,
State Capitol.

County Warrants—Chief Examiner of Accounts may prescribe form of warrants issuable by county governing bodies, with a place thereon for County Treasurer to countersign such warrants and with notice printed thereon that they are not cashable unless so countersigned, the warrants to be payable at a bank after such countersignature. (Acts 1935, page 43.)

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion under date of November 9, 1939, which reads as follows:

"In one of the Counties in the State the County governing body issues its warrants in payment of allowed claims, and they are in turn presented to the County Treasurer by the recipients and the Treasurer takes them up, cancels them, and issues Treasurer's checks in their place. The recipients have not actually received payment until they receive the Treasurer's checks.

"In the bookkeeping, the Treasurer makes a record of all warrants he has received and paid by his checks, and, in turn makes a record of his checks issued.

"We propose to change this system and have the governing body use warrants with a place thereon for the Treasurer to countersign them, and with the notice printed thereon that the warrants are not cashable unless so countersigned by the Treasurer.

"In the light of the above, please refer to House Bill 49, Page 43, General Acts of 1935, and the rulings of your office regarding this Act, and advise me in answer to the following:

"Is it your judgment that the above Act gives the Chief Examiner of Accounts the authority to change a County Treasurer's system of handling warrants issued by the Board of Revenue or governing body of a county?

"In the particular case in mind, the County governing body has fully agreed to the changes in their present system as recommended. Also, these changes will not usurp any of the County Treasurer's prerogatives, nor deprive him of any authority or responsibility now imposed on him by law."

In my opinion under the Act above referred to (Act No. 26, H. B. 49, approved February 8, 1935—Acts 1935, p. 43) the Chief Examiner of Accounts,

with the concurrence of the State Auditor and the Director of Finance, now exercising the authority of the State Comptroller, (Act No. 112, H. 72, approved March 7, 1939—Pamphlet Acts, 1939 p. 144) in respect to the powers mentioned in said Act No. 26, is authorized to make the change of system contemplated in your inquiry, to-wit, authorize the governing bodies of counties to "use warrants with a place thereon for the Treasurer to countersign them, and with the notice printed thereon that the warrants are not cashable unless so countersigned by the Treasurer."

It is my judgment that the said Act gives the Chief Examiner of Accounts, with the approval of the aforementioned officials, the authority to change a County Treasurer's system of handling warrants issued by the County governing body, whether or not such body agrees to the change.

The aforementioned power is necessarily implied in the legislative grant of power in Act No. 26 aforesaid, "to prepare * * * such forms of bookkeeping and accounting books, records, reports and other blank forms as may be necessary for the installation of a uniform system of accounting and reporting in and for the county offices of this State wherein the officers thereof are charged with any duties of receiving and disbursing public funds or other funds, and to transmit to such officers copies of such forms." **Quarterly Report of the Attorney General, Vol. XIII,** page 60.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 1, 1939.

Hon. W. W. Lazenby,
Tax Assessor, Lee County,
Opelika, Alabama.

Taxation—Exemptions to insane person cumulative—Homestead Exemption provided by Act No. 107, Special Session 1936-37, Legislature of Alabama, is in addition to exemption to insane persons by Section (f) of the General Revenue Act of 1935, Act No. 194, H. B. 324, General Acts of Alabama, 1935, page 256.

Exemption effective although exemptioner rents part of homestead.

Taxpayer who does not assess his property on or before the third Monday in January of the current year waives the exemption provided for blind persons under the 1935 Revenue Law.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of November 18, 1939, in which you request my opinion as follows:

"I would appreciate very much an opinion on the following cases.

"One is the case of L. W. Montgomery who is returning property assessed value $20,860, he being in a hospital and has been for a number of years. His wife says that he is insane, she and her children claim a house and lot here in Opelika as homestead exempt valued at $1960. She also claims the sum of $1200 due to the fact that her husband is insane. I want to know if I shall allow the above deductions, also if it is up to me to know or establish the fact the husband, L. W. Montgomery, is insane. In this particular case the claim has been deducted on the 1939 assessment.

"I have another case very similar to the above except it is a mother and son. The mother owns property and is assessed in her name and is her home when she is there, also her son and his family live in the same house with her. The son has property assessed to himself but does not claim any exemption. This lady's property was all property assessed for 1939 and no exemption for the insanity claimed until today.

"I want to know if she is entitled to the homestead and insanity exemption. If so, what about the year 1939 when it was not claimed until this date."

In answer to your first inquiry, I am of the opinion that the homestead exemptions provided in Act No. 107, S. 5, approved February 20, 1937, General and Local Laws, 1936-37, p. 113, is in addition to the exemptions allowed to deaf mutes, insane and blind persons provided by Section 2(f) of Act No. 194, H. B. 324, approved July 10, 1935, General Acts of Alabama, 1935, page 258, Vol. VIII, Quarterly Report of Attorney General, p. 18, Biennial Report of Attorney General, 1936-38, p. 492. The taxpayer is entitled to an exemption of $2000.00 on his homestead from State taxes **only**, and an additional exemption of **$1200** from **State** and **County** taxes. He can apply the latter exemption to his homestead if he so elects.

A person claiming exemption from taxation has the burden of proving his right thereto. **Bowman v. State Tax Commission,** 235 Ala. 190, 178 So. 216; **Henry v. McCormack Brothers Motor Car Company,** 232 Ala. 196, 167 So. 256. I am of the opinion that the burden of proof is on the party claiming the exemptions under Section 2(f), supra, and that the tax assessor would be within his legal rights in requiring the establishment of the fact that the party was insane.

In answer to your second inquiry, I am assuming that the party claimed the homestead exemption. If the party had claimed the homestead as exempt, then it is my opinion that these exemptions must be allowed. This office has held that if the taxpayer occupies the property as his homestead the fact that he rents a small portion thereof and a house situated thereon to another will not deprive him of his right to tax exemption under the homestead exemption act. Biennial Report of Attorney General, 1936-38, p. 385. The same rule would apply where there is a gratuitous occupancy of part of the premises. It will be observed that the fact the son lives with his mother would not forfeit her right to claim the homestead as exempt.

This office under date of January 5, 1938, Quarterly Report of Attorney General, Vol. X, p. 27, ruled that the homestead exemptions allowed under

the law must be claimed on or before the third Monday in January of the current tax year otherwise such exemption is forfeited. Biennial Report of Attorney General, 1936-38, page 438. The same ruling was made with reference to blind persons claiming exemption under the 1935 Revenue Act. Quarterly Report of Attorney General, Vol. VIII, page 316. On October 5, 1939, this office, in an opinion to Hon. B. P. Singleton, Chief Examiner of Accounts, held that claims for personal property exemptions must be claimed within the time required for claiming real estate exemptions.

The premises considered, it is my opinion that the claim for exemptions under Section 2(f), supra, comes too late.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 1, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Taxation—

Tax Collector can enforce state and county liens for ad valorem taxes against personal property even though state and federal governments have liens filed against said property for sales tax and social security tax.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion of recent date, which follows:

"Prior to levy by the Tax Collector on personal property for taxes, the State of Alabama had filed a lien on same for Sales Tax and the Federal Government had filed a lien on the same property for Social Security Tax.

"Taking the above into consideration, please advise me as follows:

"1. Will such liens in any degree stop the Collector from levying and selling personal property for taxes as provided by the 1935 Revenue Act?"

In reply to your inquiry, attention is first called to Section 372 of the 1935 Revenue Act, General Acts of 1935, which is as follows:

"Section 372. From and after the first day of October of each year, when property becomes assessable the State shall have a lien upon each

and every piece or parcel of property owned by any taxpayer for the payment of all taxes which may be assessed against him and upon each piece and parcel of property real or personal assessed to owner unknown which lien shall continue until such taxes are paid, and the county shall have a like lien thereon for the payment of the taxes which may be assessed by it; and if such property is within the limits of a municipal corporation such municipal corporation shall have a like lien thereon for the payment of the taxes which may be assessed by it. These liens shall be superior to all other liens and shall exist in the order named and each of such liens may be enforced and foreclosed by sale for taxes as provided in this Act, or as other liens upon property are enforced."

The above section applies primarily to ad valorem taxes of the State and county and makes the State and county lien superior to all other liens, including those of municipalities. Opinion to Hon. Roy Johnson, Tax Assessor Jefferson County, Birmingham, Alabama, under date of March 26, 1936, (Quarterly Report of Attorney General, Vol. II, page 34).

It is a well established principle of law both in this state and sister states that the lien which attaches for ad valorem taxes is superior and has priority over all other liens. This principle is well stated in the case of **City of Walla Walla v. State,** 85 Pac. (2d) 676. In this case, Mr. Chief Justice Steinert, in delivering the opinion of the Court, said:

"The general ad valorem tax upon real property lies at the foundation of the tax structure of the state, and its paramount rank is, in concept, well-nigh traditional. Such tax is imposed directly upon property and exacted from all owners thereof. It is levied annually, at a regular time, and operates uniformly according to fixed general rules. In reliance upon the comparative certainty of its collection, public officials administer the affairs of state. That this tax be promptly and fully collected is of supreme and vital importance to the people of the commonwealth."

See also **In re: Opinions of the Justices,** 234 Ala. 358, 175 So. 690; **City of Winston-Salem v. Powell Paving Co.,** 7 Fed. Supp. 424; **Berrymont Land Co. v. Davis Creek Land & Coal Co., et al.,** 193 S. E. 577.

In my judgment, under the provisions of Section 372, supra, and the authorities heretofore cited, the lien in favor of the State and county for ad valorem taxes is superior to the lien of the State for sales tax. Therefore, in this connection we have only to decide whether or not the lien in favor of the State and county for ad valorem taxes is superior to the lien of the United States for social security taxes. I think so. The tax imposed by the Social Security Act is collected by the Internal Revenue Department of the United States. See sub-Chapter A of Chapter 9 of United States Statutes at Large, Internal Revenue Code, Vol. 53, Part 1. However, neither the act itself nor the provisions of the Internal Revenue Code give the lien for social security taxes priority over other liens and as priority is not an attribute of sovereignty, but depends on the Acts of Congress (See **City of Winston-Salem v. Powell Paving Co. of North Carolina, Inc., et al.,** 7 Fed. Supp. 424; **United States v. State Bank of North Carolina, 6 Pet.** 29, 30, 8 L. Ed. 308; **United States v. Middle States Oil Corp.** (C.C.A. Okl.), 18 F. (2d) 231, 57 A. L. R. 848) the said lien does not have priority over other liens. The lien in favor of the United States is established by Section 3670 of the Internal Revenue Code, Vol. 53, Part 1, United States Statutes at Large. Said section is as follows:

"Section 3670. PROPERTY SUBJECT TO LIEN. If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

As pointed out in the case of **City of Winston-Salem v. Powell Paving Co. of North Carolina, Inc., et al.,** supra, Section 3186 of the Rev. St. (26 U.S.C.A. Sec. 115) which is the same or substantially the same as Section 3670, supra, amounts to only a general lien and not necessarily favored over any other lien.

From the above authority, it will be seen that the lien of the State for sales tax and the lien of the Federal government for social security tax does not have priority over the lien in favor of the State and county for ad valorem taxes. Therefore, the only question remaining to be answered is whether or not the Tax Collector can levy on personal property to collect State and county ad valorem taxes when at the time said levy is made the State and Federal governments have filed liens against said property for sales tax and social security tax.

In my judgment, this last question should be answered in the affirmative. As heretofore pointed out, the State and county lien for taxes is paramount to the lien of the state for sales tax and that of the Federal government for social security tax. This being true, the filed liens of the State and Federal government for sales tax and social security tax cannot prohibit the proper authorities from levying on personal property in an effort to collect the State and county ad valorem taxes. The State and Federal governments had a right to exercise the liens for sales tax and for social security tax respectively and the failure to exercise such rights cannot, as heretofore pointed out, prohibit the proper authorities from enforcing the State and county lien for ad valorem taxes. Citing **City of Winston-Salem v. Powell Paving Co. of North Carolina, Inc.,** supra; **Berrymont Land Co. v. Davis Creek Land & Coal Co., et al,** supra; **City of Walla Walla v. State,** supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 4, 1939.

Hon. Robert T. Simpson, Jr.,
Solicitor, 11th Judicial Circuit,
Florence, Alabama.

Criminal Law—Guilty pleas—

Provisions of Section 4 of Act No. 227, H. B. 417, approved August 16, 1939, restricting the time within which a court may not enter an order fixing a date for the defendant to formally make and enter his plea of guilty as provided by such act cannot be waived by the defendant.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of November 27, 1939, in which you request my opinion as follows:

> "This letter deals with the recently enacted legislation permitting pleas of guilty in felony cases on information. The act prescribes that upon notification to the court by the defendant of his desire to plead guilty, the court sets the matter down for hearing at the end of three days with the appointment of counsel for the defendant if he should have no lawyer. This three day provision is very burdensome to us in this Circuit. We have three large counties and in each case it necessitates two trips to the courthouse. One to arraign the defendant and be notified of his intention and at the end of three days return to accept his plea of guilty.
>
> "This inquiry is for an opinion from you as to whether or not the defendant after his counsel has been appointed or employed can waive this three day provision. I think he can and if you agree with me, I will appreciate and am sure the other Solicitors and Judges will likewise be delighted to have such an opinion."

In my opinion, a defendant wishing to enter a plea of guilty as provided by Act No. 227, H. B. 417, approved August 16, 1939, may not waive the three-day provision inserted in Section 4 of said act. Section 4 is as follows:

> "Section 4. When such information has been filed as hereinabove provided, and counsel employed or appointed, the court shall, by order entered upon the minutes of the court, **fix a date for the defendant to formally make and enter his plea of guilty in open court, which date shall not be within fifteen days after the arrest of the defendant nor within three days after notice to the court of his intention to plead guilty and notice of which date shall be served by the sheriff upon the defendant and upon his counsel."** (Emphasis supplied)

The constitutional amendment for which Act No. 227 is the enabling act, was in this state, a complete departure in felony cases. By the amendment, the legislature was authorized to pass legislation by which the defendant was allowed to waive that which had heretofore been considered a fundamental right, to wit, the indictment by a grand jury. The legislature in the drafting of the enabling act has sought in plain and unambiguous language to provide each defendant with a panoply of certain safeguards to insure, insofar as legislation may do, that every defendant will be given sufficient time to weigh the eventualities of his guilty plea and to prevent, if possible, pleas of guilty induced by over-zealous activities on the part of law enforcement officials.

It was in this spirit, therefore, that the three-day provision was inserted in the act. To hold that the defendant may waive such provision would be to defeat the very purpose of the proviso.

The writer is fully aware of the inconvenience the provision may cause the court but appeal for redress must be made, under the circumstances, to

another tribunal—that of the people and their representatives in the legislature.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

December 5, 1939.

Commissioners Court of Chambers County,
LaFayette, Alabama.

County Governing Bodies—

May purchase materials for construction or repair of county roads, and contract to pay therefor out of State gasoline tax funds allocated to the County over a period of ten to twelve months.

Opinion by Assistant Attorney General Matthews.

Gentleman:

I have your request for official opinion dated November 21, 1939 which follows:

"The Commissioners' Court of Chambers County plans to purchase a quantity of lumber for the use in the construction or repair of bridges on the county roads in Chambers County, Alabama, under its supervision and control. The approximate cost of the lumber to be purchased is $5000. The lumber purchased will be approximately equally divided among the four commissioners' districts in the county, the county being divided into four commissioners' districts. We plan to finance the purchase of this lumber over a period of some ten to twelve months, having each commissioner pay from the portion of the State gasoline tax fund allocated to his district (the State gasoline tax fund in Chambers County is divided equally among the four commissioners' districts) a portion of the $5000 corresponding to the portion of the lumber used in his district. Payments will be made monthly.

"Please advise us if the Commissioners' Court of Chambers County has the legal authority to purchase lumber in this manner and to enter into a contract for the payment of the lumber so purchased in the manner and from the funds outlined above."

Section 1397 (110) of Michie's Code, 1928 empowers county governing bodies "to make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain, a good system of public roads, bridges and ferries in their respective counties."

See also **Isbell v. Shelby County,** 235 Ala. 571, 180 So. 567. See also **Quarterly Report of Attorney General, Vol. XVI, p. 89.**

The plan outlined in your request for financing the purchase and use of lumber for construction and repair of bridges is, in my opinion, unobjectionable, and the Commissioners Court has the legal authority so to purchase the same and to contract for payment in the manner and from the funds mentioned.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 5, 1939.

Hon. J. C. Pattillo, Clerk,
Circuit Court, Chilton County,
Clanton, Alabama.

Circuit Clerks—Chilton County—

Not entitled to commissions on fines and solicitor fees that he collects and remits to the county or state from cases in Inferior Law Court of Chilton County.

Trial Tax—

Collection of trial tax only applies to cases in Circuit Court.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of November 14, 1939, in which you request my opinion as follows:

"At the recent session of the Legislature of Alabama a Local Act for Chilton County was passed creating an Inferior Law Court for Chilton County.

"Section 3 of the Bill provides that the Clerk of the Circuit Court of Chilton County shall be Ex-Officio Clerk of the Inferior Law Court, shall have the powers and discharge the duties which shall devolve upon the Clerk of the Circuit Court, and shall be entitled to the same fees, etc., but does not say that he shall be entitled to 5% commission on fines and Solicitor's fees that he may collect and remit to the County or the State. There is no provision in said Bill for collecting a trial tax in each trial in each case.

"Please, therefore, advise me whether or not I will be entitled to deduct 5% commission in my remittances of fines and Solicitor's fees, and, second, if I shall collect a trial tax in each trial in said Inferior Law Court in Chilton County."

In answer to your inquiry, I call your attention to Section 3 of Act No. 335, H. B. 836, approved September 5, 1939, which reads as follows:

"Section 3. That the Clerk of the Circuit Court of Chilton County shall be ex-officio clerk of said court and shall have the powers and discharge the duties, which will devolve upon the Clerk of the Circuit Court, and shall be subject to the same pains and penalties with regard to the duties of this office and shall be entitled to the same fees in cases wherein the amount involved is more than $50.00 as are now or may hereafter be allowed to Circuit Court Clerks of Alabama and in cases where the amount involved is $50.00 or less the same fees as are now or may hereafter be allowed Justices of the Peace, and the same shall be collected as such fees are collected in the Circuit Court. The clerk of the said Inferior Law Court as herein designated shall make and enter into a bond in the penal sum of Three Thousand ($3,000.00) Dollars for the faithful performance of his duties as Clerk of the said court, said bond to be approved by the Judge of the Inferior Law Court of Chilton County, Alabama."

Your attention is called to General Acts, 1931, page 669, which is as follows:

"The clerks and registers of the several circuit courts of the state of Alabama shall receive five per cent of any sum or sums collected by such clerk or register for the state of Alabama, as compensation for the collection and remittance of the same, the said percentage to be deducted by such clerk or register making the collection from such sum or sums collected."

It will be observed that said Act does not refer to clerks of any courts except the Circuit Court.

Act No. 335, H. B. 836, approved September 5, 1939, creating the Inferior Law Court of Chilton County has been examined and nothing is found in said Act which would authorize you to deduct five per cent commission on money collected by you and remitted to the County or State.

Any public officer claiming compensation must be able to point to some clear and definite provision of law authorizing the same, and such statutes are not to be extended, but must be strictly construed. **Troup v. Morgan County,** 109 Ala. 162, 19 So. 503; **State ex rel. Holcombe v. Stone,** 233 Ala. 243, 171 So. 366; Quarterly Report of Attorney General, Vol. XV, page 296.

Your second inquiry must be answered in the negative. Section 9 of Act No. 194, H. B. 324, approved July 10, 1935, General Acts, 1935, pages 256, 263, provides in pertinent part as follows:

"Section 9. A trial tax of three dollars ($3.00) be, and the same is hereby imposed in each case, civil, criminal and equity, which is now

pending and which hereafter goes upon the docket of any circuit court in this State, to be taxed and collected as other costs, and when collected to be paid by the clerk or register of such court as follows: * * *"

It will be observed that the trial tax levied by this section applies only to cases pending and which go on the docket of any **circuit court** of the State. Quarterly Report of Attorney General, Vol. VIII, page 254.

Tax statutes must be construed strictly against the taxing power. **Jefferson County v. Smith,** 23 Ala. App. 431, 125 So. 401.

An examination of the Act, supra, fails to disclose any provision therein for the imposition of a trial tax in the Inferior Law Court created thereby.

The conclusions announced in this opinion are limited strictly to the inquiries presented, viz., whether the clerk is entitled to five (5) per cent commission on remittances; and whether a trial tax should be collected in each case which goes on the docket.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 5, 1939.

Hon. Albert S. Towle, Member,
Revenue and Road Commissioners,
Mobile County,
Mobile, Alabama.

County Governing Body—Mobile County—

Authorized to provide such means, including venetian blinds, as may be reasonably necessary or proper for comfortable use and occupation of offices in the Court House building by officers and their employees.—Code 1923, sec. 6755(1), as amended; Local Acts 1915, p. 151.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion dated November 21, 1939, which reads as follows:

"Please advise me if the County has authority to furnish venetian blinds to the windows in the Court House building.

"The Clerk of the Circuit Court has requisitioned for blinds for the windows in his offices which are located on the west side of the Court

House building and the afternoon sun shines in the offices until it is impossible for the employees in the office to perform their work. In the past the County has furnished shades and awnings for protection from the sun, but the awnings have to be renewed or replaced every few years and the venetian blinds would be permanent."

I am of opinion that the governing body of a county under its statutory authority (Code 1923, Sec. 6755(1), as amended, "to direct and control the property of the county as it may deem expedient according to law," is authorized to furnish venetian blinds, provided they are reasonably necessary or proper for the comfortable use and occupation of the court house building.

As pertinent possibly to your inquiry, I may also call your attention to Act No. 282, H. 1275, approved August 27, 1915, (Local Acts 1915, p. 151) authorizing your governing body to provide telephones and "all other conveniences and necessaries for the courts of Mobile County, and for the proper dispatch of the business of said Courts, and to pay for the same out of the general funds of the County."

Inasmuch as, according to your statement, it is impossible for the employees in the Clerk's office to perform their work without protection from the afternoon sun, any means reasonably adapted to such protection, including venetian blinds, is authorized under the local act, if necessary or convenient for the proper dispatch of the business of the Court.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 5, 1939.

Hon. T. C. Almon,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Poll tax—Exemptions—National Guard—

Active members of the National Guard of Alabama mustered into service on October 1, 1939, are exempt from poll tax which became due October 1, 1939.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of November 17, 1939, in which you request my opinion as follows:

"Recently a new National Guard Unit has been organized in Decatur, Morgan County, Alabama.

"This Company was mustered on October 1, 1939. Will you please advise me if the members of this National Guard Company, which were mustered on October 1, 1939, would be required to pay poll tax for the year 1939."

In my opinion, your inquiry must be answered in the negative, that is to say, all those members of the National Guard Organization who present certificates of exemption, duly executed by those persons authorized by law to issue such certificates, are exempt from the payment of poll tax which became due October 1, 1939.

Section 4 of Act So. 509, H. B. 773, approved September 22, 1939, which amends Section 11 of the Military Code of Alabama, 1936 (Act No. 143, H. B. 63, approved April 22, 1936, General and Local Acts, Extra Session, 1936, p. 105) provides in part:

"Owing to liability to call for military duty during their term of service, every officer and enlisted man of the National Guard and Naval Militia of Alabama shall be exempt from poll tax, * * * during his active membership, any local or special laws to the contrary notwithstanding; * * *. The commanding officer of any company, troop, battery or any similar organization, shall furnish each member of his command applying for same such certificate of membership as may be prescribed by the Adjutant General, signed by such commanding officer, which certificate shall be accepted by any court as proof of exemption as provided by this law. Such certificates shall be issued to every officer and enlisted man, as aforesaid, under such Regulations and upon such forms as may be prescribed and provided by the Adjutant General. The said certificates shall be effective, as to poll tax, for the poll tax year for which same is issued without regard to dates prescribed for payment of poll tax, * * *."

The poll tax became due on October 1, 1939, and on that date the members of the National Guard Organization were mustered into the active National Guard of Alabama. So that, the exemption from payment of poll tax obtained upon the same date that the poll tax became due.

The Supreme Court spoke to a similar question in the case of **Shepherd v. Sartain,** 185 Ala. 439, 64 So. 57. There the Court construed Subdivision (6) of Section 2061 of the Code of Alabama, 1907, which exempted from poll tax "all persons permanently disabled, whose taxable property does not exceed $500." Mr. Justice Somerville, speaking for the majority, in construing the exemption provision said:

"If the voter who exhibits the disability would excuse himself from the payment of any particular poll tax, he must assume the burden of showing its initiation before the tax became due, and that his taxable property did not exceed $500 **at the time the tax became due.** The ownership of less than that amount at other times during the year will not support the exemption, nor will the ownership of more than that amount at other times defeat it." (Emphasis supplied)

It will be noted that Section 4 of Act No. 509, quoted supra, provided in part that "the said certificate shall be effective, as to poll tax, for the poll tax year for which same is issued **without regard to dates prescribed for payment of poll tax.**" This would seem to indicate that it was the legislative intent to extend the exemption to an active member of the National Guard although his enlistment or appointment and muster into the service occurred after October 1st of any given year. However, under the facts submitted in your inquiry, an opinion upon that question is unnecessary inasmuch as the members of the active National Guard dealt with in your request were in fact appointed or enlisted and mustered into the service on October 1, 1939, the date that poll tax became due.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 5, 1939.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Revenue Act, 1935, Schedule 147—Transient Dealers in Tobacco.

A transient dealer who procures a license as provided by Schedule 33 of the 1935 Revenue Act is not liable for the license imposed by Schedule 147 of the 1935 Revenue Act.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of November 10, 1939, requesting my opinion as follows:

"Re: Schedule 33 and Schedule 147,

"Your opinion is requested as to whether or not a person engaged in the business of selling tobacco products at wholesale who has procured a license under Schedule 33, is likewise subject to a license if he engages in business as transient dealer. That is, sells merchandise, other than tobacco products, from a motor vehicle direct to the merchant for resale.

"Under Schedule 147, Revenue Acts of 1935, (Page 290, Simon's Code) your attention is called to the provisions of the first sentence contained in said Schedule, to-wit:

" 'Each person doing business as a transient dealer as defined in this Schedule and who does not pay a privilege license under Schedule 33, or a license permit under Schedule 159.16 shall pay an annual license tax to the State of $30.00.'

"Our construction of this exemption to licensees under Schedule 33 is to the effect that it exempts such licensees whose sales as a transient dealer are confined to the sale of tobacco products and not to other merchandise.

"1. Would a wholesaler of tobacco products who has procured a license in Montgomery County under Schedule 33 be required to procure another State and County license in Dallas County if he maintains an established place of business in Dallas County at which is sold tobacco products wholesale?"

You state that the merchant referred to in this request has procured a license to sell tobacco as provided by Schedule 33 of the Revenue Act of 1935. Your attention is called to the specific exclusion contained in Schedule 147 of the 1935 Revenue Act, which schedule is found on page 501 of the 1935 Act, and reads in pertinent part as follows:

"Schedule 147. Each person doing business as a transient dealer as defined in this Schedule **and who does not pay the privilege license under** Schedule 33, *** shall pay" etc. (Emphasis supplied)

It will be noted from the clear and unambiguous language of the above quoted portion of Schedule 147 that a person doing a business as a transient dealer as defined in the schedule and who does not pay the privilege tax as provided by Schedule 33, shall pay the license as provided by Schedule 147.

In my opinion this language is clear and unambiguous, and there is no room for construction or any basis for looking to the intent of the Legislature at the time this schedule was passed.

You are, therefore, advised that in my opinion a person who purchases a license as provided by Schedule 33 of the 1935 Revenue Act is not liable for the license imposed by Schedule 147 thereof.

As to the second part of your inquiry, I need look only to Schedule 33, supra, to ascertain the answer thereto. The wording of this schedule, where it is stated that such dealer **"shall pay one privilege license to the State,"** precludes the idea that such wholesale dealer must have a different State license for each county in which he does business. The schedule says, however, that said dealer must pay "Five Dollars ($5.00) to each county in which such wholesale dealer does business." See Opinion to Hon. Eugene B. Henry, under date of October 29, 1935, page 134, Vol. I, Quarterly Report of Attorney General, Biennial Report of the Attorney General, 1934-36, page 360; Opinion to Hon. D. E. Laslie, under date of January 2, 1936, Vol. II, page 3, Quarterly Report of the Attorney General, Biennial Report of the Attorney General, 1934-36, page 449.

It is clear to my mind that this type of dealer must pay $5.00 in both Montgomery and Dallas Counties. In addition, he must pay one State privilege license fee of $100.00, regardless of the number of counties in which he does business. The above is applicable regardless of how many established places of business are maintained by such dealer.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

December 6, 1939.

Hon. Hugh White, President,
Alabama Public Service Commission,
Montgomery, Alabama.

Motor Carrier Act, 1931—

Public Service Commission has jurisdiction over that portion of a system of a motor carrier outside the police jurisdiction of a municipality which does not adjoin police jurisdiction of another municipality.

Motor carrier, subject to provisions of the Act, liable for mileage tax on each mile traveled over state maintained public highways.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of September 11, 1939, in which you request my opinion as follows:

"Re: Alabama Motor Carrier Act of 1931.

"Please give us your official opinion on the following questions:

"If an intra-city bus transportation company operating buses only, and wholly within the corporate limits and police jurisdiction of a city extends one of its bus routes a mile or two miles outside of the city limits and police jurisdiction, (a) would it then be subject to the Alabama Motor Carrier Act of 1931; further, (b) would the entire system having one such route be subject to the mileage tax, or would only that portion of the particular route extending past the police jurisdiction be subject to the mileage tax; (c) would the entire route from the terminal which is in the outlying territory, to a terminal wholly within the city be taxable, and what would constitute the terminal for such urban operator within the city, there being no such terminal as used by the inter-city carrier?

"What portion of a route, if any, is taxable under the following conditions:

"When a route is an integral part of a large intra-city bus transportation system and extends beyond the city limits and police jurisdiction of a city and serves a suburban incorporated area whose police jurisdiction adjoins the police jurisdiction of a larger community, or in the case of two communities being separated by a distance of say one mile between the police jurisdictions of the two communities served, would the entire intra-city system be taxable under the Motor Carrier Act?

"For example:

"The B bus company operates a number of routes within the police jurisdiction of the city of B. The police jurisdiction of the city of C is

two miles distant. If the B bus company runs one route to the city of C and return, does the B bus company owe any mileage tax under the 1931 act, and if so, upon what basis?

"For further example:

"Suppose the route were merely extended outside of the police jurisdiction of the city of B for a short distance, but to no other town or city, would this render the B bus company liable for mileage tax, and if so, upon what basis?

"In connection with the above, I beg to call your attention to Section One of the Alabama Motor Carrier Act of 1931, approved June 19, 1931, and also to the decision of our Alabama Supreme Court in the case of State Tax Commission vs. Burns Transportation Company, decided on to-wit, April 6, 1939."

Act No. 273, H. 53, approved June 19, 1931, General Acts of 1931, page 303, Section 1, provides in part as follows:

" * * * 'Motor transportation' shall be construed to mean the business of carrying and transporting passengers or property in motor propelled vehicles of any kind whatsoever for hire as common carriers over **any public street, alley, road or highway in this state except transportation solely and wholly within the limits of any municipality and/or, within the police jurisdiction thereof.**

"Provided, however, that this Act shall not apply to **motor vehicles** engaged exclusively in **transporting solely** within the limits of any city, town or village in this state or **within the police jurisdiction thereof.**

"The term 'highway' as used in this act shall be construed to mean any public road, street or alley dedicated to public use and/or maintained by the expenditure of public funds whether within or outside of any city, town or village." (Emphasis supplied)

Section 5 of said Act provides in part as follows:

"Every motor transportation company doing business in this state and subject to the control and jurisdiction of the commission shall pay to the state as contribution to the maintenance, repair and policing of **its public highways for each mile actually operated within the state over such public highways a mile tax of - - "** (Emphasis supplied)

Section 55 of the Motor Carrier Act provides as follows:

"When a person is engaged in business a portion of which business is that of a motor transportation operator as herein defined, **the provisions of this Act shall apply to such portion of his business, even though the remainder may not be subject to the provisions hereof."** (Emphasis supplied)

The case of **State Tax Commission v. Burns Transportation Company,** 237 Ala. 545, 187 So. 867, decided by our Supreme Court, involved a construction of the Motor Carrier Act of 1931. The headnote of that case is as follows:

"Statute imposing mileage tax on motor transportation companies but excepting motor vehicles engaged exclusively in transporting within limits of any city, town or village or within police jurisdiction thereof did not confer jurisdiction on Public Service Commission over bus operation wholly within the tri-cities of Tuscumbia, Sheffield and Florence, their respective police jurisdictions, and the government reservation attingent thereto."

In the opinion for the Court, Justice Brown, after quoting parts of Sections 1 and 5 of the act, states:

"The agreed stipulation of facts, and the map attached thereto, show that the appellee's operation is wholly within the tri-cities of Tuscumbia, Sheffield and Florence, and their respective police jurisdiction, and the government reservation attingent thereto, and supports the inference that there are no state maintained highways within any of the tri-cities.

"These facts support the conclusion, expressed in the decree of the circuit court, that appellee's operation is not within the jurisdiction of the Alabama Public Service Commission, and the influence of said Act."

In the case of **Hood v. State,** 230 Ala. 343, 162 So. 543, the Supreme Court held:

"That an operator of a motor vehicle for hire who had no established route but operated vehicle as a taxicab, contracting to carry persons from any place in the county to any specific destination for a fee which varied with the length of the trip was not a 'contract carrier' under General Acts 1932, Ex. Sess., pp. 178, 179, 180, 181 but was a 'common carrier' within the statute requiring contract or common carriers of passengers operating motor vehicle for hire to obtain permit and display a distinguishing plate on vehicle." (Gen. Acts, 1931, p. 303, Section 1)

The case of **Public Utilities Commission v. Sering Alliance Bus Line,** 35 Ohio App. 101, 172 N. E. 290, held:

"That a bus line operating within municipalities under franchise ordinances and gratuitously outside corporate limits to be a 'Motor transportation company' requiring a certificate from the utilities commission."

The exemptions under the Ohio law are almost identical with the Alabama law. (See 103 A. L. R., pp. 289-295).

The Motor Carrier Act was enacted to meet new conditions brought about by the entry of motor vehicles into the business of transporting passengers and freight over the highways as common carriers. Certain kinds were excluded from the operation of the act, viz:

"Those engaged in motor transportation solely and wholly within the limits of any municipality and/or police jurisdiction thereof." (Acts 1931, p. 303, Sec. 1)

It follows that unless the company falls within the class excluded it must comply with the requirements of the act and is subject to the jurisdiction of the Public Service Commission.

Taxing statutes should be strictly construed in favor of the taxpayer and against the taxing power. **State v. Seals Piano Co.,** 209 Ala. 93, 95 So. 451.

Bearing this in mind, it is clearly indicated by the opinion in the Burns Transportation Company case, supra, and Section 5 of the **Motor Carrier Act,** that the mileage tax may be collected only on "each mile actually operated over **State maintained public highways.**"

The language used in Section 55 of the Act is broad enough to convince the writer that the legislature intended to exempt from the operation of the Act that portion of particular routes of carriers within the limits of a municipality and the police jurisdiction thereof. It was doubtless contemplated by the legislature that many operators might operate within and without the corporate limits of municipalities and the police jurisdiction thereof, and those who operated solely and wholly within the corporate limits would be subject only to municipal licenses and taxes. In this latter case the State would exempt them from the jurisdiction of the Public Service Commission. When the exempt class seeks to extend its operations beyond the police jurisdiction of a municipality then the Public Service Commission has complete supervision over its operations outside the police jurisdiction of the municipality, and it would be due mileage tax over the entire route traveled by the bus line if it travels over state maintained public highways, whether within or without the limits of a municipality. If the state maintained public highway does not extend into the city limits of a municipality, then the carrier would only be liable for the mileage tax from the city limits of a municipality over the remainder of such highway.

Specifically answering your inquiry, I am of the opinion that under subsection (a) the company would be subject to the Alabama Motor Carrier Act of 1931. (b) Only that portion of the particular route extending past the police jurisdiction would be subject to the mileage tax provided it did not go over state maintained highways within the police jurisdiction. (c) This would depend upon whether the route ran over state maintained public highways within the police jurisdiction.

Where the police jurisdictions of municipalities adjoin, the carrier is not subject to the jurisdiction of the Public Service Commission. **State Tax Commission v. Burns Transportation Co.,** supra, and **Red Star Motor Drivers' Ass'n. v. Michigan Public Utilities Commission,** 209 N. W. 146.

In cases where the police jurisdiction of municipalities do not adjoin, the portion taxable would depend on whether or not there were state maintained public highways within the police jurisdictions over which the carrier travels.

Under the first example, the B bus company would owe mileage tax on the two miles between the police jurisdictions of the cities and if the bus travels over state maintained public highways within the police jurisdictions of B and C, it would be due mileage over that portion of the highway.

If the route were merely extended outside the jurisdiction of the city of B for a short distance but to no other town or city, it would be due mileage tax on that portion of the state maintained highway over which the bus operated.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 6, 1939.

Miss Marie Waller,
Clerk, Circuit Court,
Bibb County,
Centerville, Alabama.

Officers—Justice of the Peace—

1. Offices of justice of the peace and circuit clerk held to be offices of profit under the State, and the holding of the two offices at one and the same time by one and the same person hold to violate Section 2575 of the Code of 1923.

2. Acceptance of appointment to office of justice of the peace by one holding office of circuit clerk held, ipso facto, vacation of office of circuit clerk.

Opinion by Assistant Attorney General Small.

Dear Miss Waller:

I have your letter of November 8, 1939, in which you request my opinion as follows:

"I am writing you for some information for my own personal information. I am wondering if a Clerk of the County or Circuit Court of a County has the authority of a Justice of the Peace—if they could handle cases that come before a Justice of the Peace.

"If you rule that the above could not be legal may I ask this question. Could a Clerk of the Circuit or County Court of any County be appointed a Justice of the Peace of said County by the Governor?"

In reply to your first question, I wish to advise that in my judgment the circuit clerk has no authority to serve in the same capacity as a justice of the peace and to try the cases that come before a justice of the peace.

The authority and duties of the circuit clerk are set out under Sections 6723 and 6724 of the Code of Alabama of 1923, while the provisions governing justices of the peace are found in Sections 8700-8795 of the Code of 1923, but no synonymous authority to try cases is set out therein.

Concerning the clerk of the county court, I wish to call your attention to Section 3803 of the Code of Alabama of 1923, which provides as follows:

"3803. Clerks of circuit courts are ex-officio clerks of county courts.—The clerks of the circuit courts of the several counties of the state are made ex officio clerks of the county courts of their respective counties."

You will note that the provisions of this statute make the circuit clerk ex-officio clerk of the county court, and it therefore becomes unnecessary to give special consideration to the clerk of the county court.

I wish to further refer you to Section 2575, Subsection E, of the Code of 1923, which prohibits justices of the peace and circuit clerks from holding two offices of profit at one and the same time, and is as follows:

"2575. Persons ineligible to office.—The persons who are ineligible to, and disqualified for holding office under the authority of this state, are— * * *

"7. No person holding an office of profit under the United States, shall, during his continuance in such office, hold any office of profit under this state; nor shall any person hold two offices of profit at one and the same time under this state, except notaries public."

Without consideration of the constitutionality of the above statute, I wish to further call your attention to an opinion of the Atorney General reported in Biennial Report of Attorney General, 1928-30, page 140, and an opinion of the Attorney General reported in Biennial Report of Attorney General, 1928-30, page 159, the holdings of which are consistent with the holding here announced.

I wish to further call your attention to an opinion of the Attorney General reported in Biennial Report of Attorney General, 1930-32, page 374, where your specific question is answered.

An opinion of the Attorney General reported in Biennial Report of Attorney General, 1934-36, page 240, is in conflict herewith and is hereby expressly overruled.

In reply to your second question, I wish to advise that the answer is evident from my reply to your first question. After appointment is made and the office accepted, the acceptance of the second office, ipso facto, vacates the first. **Shepherd v. Sartain,** 185 Ala. 439, 64 So. 57.

In my judgment, the clerk of the circuit court or county court of any county may not be appointed a justice of the peace of the said county by the Governor and hold the office of justice of the peace and at the same time continue to hold the office of the clerk of the circuit court or county court.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 6, 1939.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Baldwin County—Tax Assessors and Tax Collectors — Commissions—

Two mill tax, appropriated for school purposes, levied by Baldwin County governing body under authority of Act No. 609, H. B. 1167, approved February 28, 1901 (General Acts, 1900-01, page 1446), is part of five mill levy for general purposes authorized by the first clause of Article XI, Section 5 of the Constitution of 1875, which is substantially the same as the first clause of Section 215 of the Constitution of 1901; and commissions of tax assessor and tax collector thereon are paid, respectively, on sliding scale basis as provided by Sections 22 and 161 of the Revenue Act of 1935, and amendments thereto.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of October 26, 1939, in which you request my opinion as follows:

"Please refer to Section 215 of the Constitution of 1901, Acts of 1900-1901, page 1446, Sections 213, 217 and 6755, Code of Alabama, 1923, and the following tax levy:

"'BE IT RESOLVED, That there is hereby levied by this County Commission for the year commencing October 1, 1938, and ending September 30, 1939, a GENERAL TAX of three (3) mills on each dollar worth of taxable property in Baldwin County, Alabama, and on all other subjects of taxation in said county as assessed for revenue to the State of Alabama as shown by Assessment Books for 1939;

"'BE IT FURTHER RESOLVED, That to pay any debt or liability now existing against Baldwin County incurred for the erection, construction or maintentance of or repair to any necessary public buildings, bridges or roads or that may be hereafter created for the erection of necessary public buildings, bridges or roads, there be and hereby is levied a tax of two and one-half (2½) mills on each dollar worth of taxable property in Baldwin County, Alabama, or other subjects of taxation as assessed by proper officers for the year commencing October 1, 1938 and ending September 30, 1939, to be used exclusively for the purposes of paying any debt or liability incurred for the construction, erection or maintenance of or repair to any necessary public buildings, roads and bridges of Baldwin County, Alabama, or any debt that may be hereafter created for the erection, construction or maintenance of or repair to necessary public buildings, roads and bridges in said county.

"'BE IT FURTHER RESOLVED, That there is hereby levied a tax of two (2) mills on each dollar of taxable property or other subjects of taxation in Baldwin County, Alabama, as the same is assessed for taxes by proper officers for the year commencing October 1, 1938 and ending September 30, 1939, as authorized by an Act of the Legislature of Alabama approved February 28, 1901, the same to be used exclusively for public school purposes in accordance with said act, and to be paid over in the manner required by law.'

"and advise me as follows:

"1. Did the ordination of the Constitution of 1901 repeal the Act of 1900-1901, page 1446?

"2. Is the above levy constitutional insofar as it relates to the two (2) mill levy for school purposes?

"3. In the event that part of such levy is unconstitutional could the County Governing Body levy a General Tax of five (5) mills and specify that two (2) mills of such levy be used exclusively for school purposes?

"4. In the event the levy of two (2) mills for school purposes is constitutional, would such two (2) mills be considered a part of the five (5) mills that can be levied for General purposes?

"5. Should the Tax Assessor and Collector be paid commissions on the sliding scale, as provided by law allowing commissions on taxes for General purposes, on the two (2) mills levied for school purposes or should they be paid a flat two per cent on such amount, as provided by law allowing commissions on special taxes?"

The two mill levy in question, appropriated for school purposes, was made under Act No. 609, H. 1167, approved February 28, 1901 (Acts, 1900-1901, page 1446). Section 1 of said act provides as follows:

"Section 1. Be it enacted by the General Assembly of Alabama, That the court of county commissioners of Baldwin County be, and it is hereby directed and required to levy and have collected for the year 1901 a special school tax of one-half of a mill, and to increase such tax one-half of a mill each year thereafter until such special tax reaches two mills per annum, and when said special tax reaches two mills per annum, to levy a special school tax of two mills per annum each year thereafter; **provided, that such special tax when added to the assessment for other county purposes shall not exceed the constitutional limit for county taxation;** said special tax shall be used only for the support and maintenance of public schools in said county as hereinafter provided." (Emphasis supplied)

Article XI, Section 5 of the Constitution of 1875, in effect at the time of the enactment of the above quoted provision of the statute, provided in part:

"No county in this State shall be authorized to levy a larger rate of taxation, in any one year, on the value of the taxable property therein, than one-half of one per centum; * * *"

At that time there was no provision in the Constitution comparable to Section 269 and the Third Amendment of the 1901 Constitution, authorizing the levy of special taxes by the county for school purposes upon submission of the question to the qualified electors thereof.

Prior to the Constitution of 1901 the Supreme Court in **Southern Rwy. Co. v. St. Clair County,** 124 Ala. 491, 27 So. 23, considered an act to provide for the better support and maintenance of public schools of St. Clair County (Pamhplet Acts, 1894-95, pages 914-916). By the act, the governing body of

the county was authorized to levy and collect an annual rate of one mill on all taxable property in the county **for the support and maintenance of public schools of the county,** with a proviso that the tax rate of said county should not exceed a rate of five mills, which was then authorized by Section 5 of Article XI of the Constitution of 1875.

In the cited case the court held that it was within the competency of the Legislature to authorize a county governing body to levy a tax appropriated especially for school purposes if the tax levied, together with other taxes levied for general purposes, did not exceed five mills as then authorized by the Constitution. See also **Francis v. Southern Rwy. Co.,** 124 Ala. 544, 27 So. 22.

The first clause of Section 5, Article XI, of the Constitution of 1875 was reordained by the people as the first clause of Section 215 of the Constitution of 1901 in substantially the same language. At the time that the Constitution of 1901 became effective, that is to say, November 28, 1901, the decisions of the court in **Southern Rwy. Co. v. St. Clair County** (decided December 19, 1899), and in **Francis v. Southern Rwy. Co.** (decided December 23, 1899), had been rendered by the court. It is presumed that the framers of the 1901 Constitution had in mind the judicial construction of the first clause of Section 5 of Article XI of the Constitution of 1875 when they reincorporated the same, without material change, into Section 215 of the Constitution of 1901, as the first clause of said section. When a provision appearing in a former constitution is reordained into a subsequent constitution without material change, the rule of construction is that the reordainment carries with it the settled judicial interpretation of the provision. See Alabama Digest, Vol. 4, "Constitutional Law", Key No. 18, and the cases there cited.

The framers of the Constitution of 1901 incorporated therein, for the first time, Section 269, in substance authorizing counties to levy a tax not exceeding one mill for the support of public schools thereof, on condition that the rate of the tax, the time it was to continue and the purposes thereof first should have been submitted to and approved by a designated majority of the qualified electors voting at an election held for that purpose. However, in view of the substantial readoption of the first clause of Article XI, Section 5, of the Constitution of 1875 into the Constitution of 1901 as the first clause of Section 215 thereof, after the pronouncements of the Supreme Court in the St. Clair County case and the Francis case, supra, it is my opinion that it cannot logically be concluded that the framers of the Constitution of 1901 intended Section 269 to be a limitation upon the first clause of Section 215 of that Constitution.

The same reasoning applies with equal force to Amendment III, Article XIX, which became a part of the Constitution on November 22, 1916.

I therefore advise you, in answer to your first inquiry, that the ordination of the Constitution of 1901 did not have the effect of repealing or superseding or in any way adversely affecting Acts 1900-01, page 1446, supra, relating to the levy of taxes appropriated especially for school purposes by Baldwin County.

Analogous decisions rendered by the Supreme Court since the effective date of the Constitution of 1901 have applied substantially the same principle with reference to appropriating, by means of the ordinance or Resolu-

tion levying the tax, portions of the five mill levy for general purposes authorized by the first clause of Section 215 of the Constitution of 1901 to supplement the special road and bridge funds authorized by subsequent provisions of said Section 215.

In 1909 the governing body of Jefferson County adopted a resolution as follows:

> "Ordered by the Board of Revenue of Jefferson County, Alabama, that there be levied upon all property and value assessed in the county for revenue to the state for the current tax years 2½ mills on the one dollar for the general fund for the current year, **one (1) mill on the one dollar for macadam roads,** one (1) mill on the one dollar for bridges and public buildings, one (1) mill on the one dollar for public schools of the county, one (1) mill on the one dollar for school tax voted June 20th, 1904, ¼ mill on the one dollar for the interest on sanitary sewer bonds and for keeping in repair and maintaniing the sanitary system of Jefferson county, and for the protection of water supplies of Jefferson county, Alabama."

By Acts, Special Session, 1909, pagt 303, it was provided that the maintenance of streets of municipalities in the State of Alabama was, for certain purposes, declared to be a county matter; and that the county, in counties where there is levied a road tax, general or special, or where by the tax levy a portion of the tax is levied for or devoted to the purposes of constructing, etc., roads and highways in the county, shall pay over to each municipality therein one-half the money collected on such road tax on the property located in such municipality; and that such sums paid to such municipalities should be used by them exclusively for maintaining the streets within the said municipalities.

The City of Birmingham sought to require Jefferson County to pay over to it a portion of the levy made by the resolution of the county governing body levying the tax for road purposes, quoted supra.

In **Board of Revenue of Jefferson County v. State ex rel. City of Birmingham,** (decided in 1911), 172 Ala. 138, 54 So. 995, it was held that the tax "for macadam roads," appearing in the resolution, was levied under the **power to tax for general purposes,** that is to say, the first clause of Section 215 of the Constitution; and that the same was not a **special tax** within the meaning of the third clause of said Section 215.

In **Commissioners Court of Calhoun County v. City of Anniston,** 176 Ala. 605, 58 So. 252, (decided in 1912) the court considered a similar statute authorizing the appropriation of a part of the taxes levied under the power to tax for general purposes, to supplement a road and bridge fund for the county.

In speaking to the question, the court, through Mr. Justice Dowdell, said:

> "It appears from the record in the present case that in the years 1907, 1908, 1909, and 1910, under the provisions of an act of February 28, 1889, and an amendatory act thereof, approved February 11, 1891, to authorize the commissioners' court of Calhoun county to levy taxes for working the public roads of said county, a special tax of 3/20 of 1 per cent. on the taxable property of the county was levied for the purpose

of repairing and building public roads in the county, and that this tax was a part of the ½ of 1 per cent. authorized by section 215 of the Constitution of 1901 for general purposes. The act of February 28, 1889 (Acts 1888-89, p. 866, Section 2), authorized the levy of a special tax of 1/10 of 1 per cent. for road purposes, and expressly provided, 'which shall be a part of the one-half one per cent. now authorized by the Constitution for county purposes.' And the amendatory act of February 11, 1891 (Acts 1890-91, p. 564), which authorized the levy of 3/20 of 1 per cent., provided as follows: 'That the said commissioners' court shall levy a special tax not to exceed three-twentieths of one per cent. on the taxable property of the county, which shall be a part of the one-half of one per cent. now authorized, to be assessed and collected as other taxes, and when paid into the treasury it shall be kept separate from other taxes and used only for the purposes indicated in this act.' The purposes indicated in the act were the working of the public roads of Calhoun County. It was evidently the intention and purpose of the Legislature in the enactment of this law not to exceed, but to keep within, the constitutional limit of ½ of 1 per cent. authorized to be levied by the county for general purposes, and the effect was to appropriate so much of the tax levied and collected within the constitutional limit for the purposes mentioned in the act, and which it was within the power of the Legislature to do. *** "

What on casual reading seems an opposite conclusion was reached by the United States District Court for the Southern District of Alabama in **Sidney Spitzer & Co. v. Monroe County**, 274 Fed. 819 (decided in 1921). However, a careful study of Judge Ervin's opinion in that case will disclose that it undertook to differentiate between the power of a county governing body, acting under **general** authority, to levy and appropriate a part of the tax authorized for general purposes to special road purposes, and the power under special acts giving **special** authority to that end.

Applying the legal principles announced in the decisions, supra, to the facts submitted in your request for opinion, I have to advise you that your second inquiry must be answered in the affirmative; and that the appropriation to school purposes of two mills of the five mill tax levied for general county purposes, under authority of the 1900-01 act, supra, relating to Baldwin County, is constitutional and valid.

My answer to your question numbered two dispenses with the necessity of an answer to your question numbered 3.

Your question numbered 4 has been answered by my answers to your questions numbered 1 and 2.

Specifically answering your question numbered 5, it is my opinion that, inasmuch as the two mill levy for school purposes is included within the five mill tax levied for general county purposes and remains a part of the 5 mill tax levied for general county purposes, notwithstanding the appropriation to school purposes, the commissions of the tax assessor and tax collector upon collections of the proceeds of said two mills so levied, appropriated and set apart are computed on the "sliding scale" basis, under the provisions of Sections 22 and 161 of the Revenue Act of 1935. As to commissions earned after October 1, 1939, of course, the sliding scale basis provided in Act No. 326, H. 322, approved August 31, 1939, and Act No. 325, H. 321, approved August 31, 1939, which amended Sections 22 and 161, supra, respectively, for the

computation of said commissions will govern. Cf. Opinion to the Chief Examiner of Accounts under date of October 10, 1939.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 6, 1939.

Hon. J. W. Shoemaker, Member,
Board of Finance & Control,
Cullman County,
Cullman, Alabama.

Counties—Justices of the Peace—

Designation of offices in the courthouse, to be occupied by officers entitled to rooms therein, is under the direction and control of county governing body; and it is not mandatory that justices of the peace be furnished an office or space in the courthouse.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of November 24, 1939, in which you request my opinion as follows:

"Please advise me in my official capacity as an Associate Member of the Board of Finance & Control of Cullman County, Ala., whether or not there is any authority of law making it incumbent upon the County Governing Body to furnish or permit a Justice of the Peace to occupy quarters in the County Court House.

"One of the Justices of the Peace of Cullman County has been occupying or using space in the office of various County Officials. By resolution adopted, the Board has made demand upon said Justice to remove his books and accounts from the Court House. This he has refused to do stating that it is not within our authority to make such demand."

I am of the opinion that your inquiry should be answered in the negative.

Section 6755 (1), Code of Alabama, 1923, as amended by Act No. 75 H. 150 approved Feb. 18, 1927, General Acts 1927, page 57, provides in pertinent part as follows:

"6755. Authority of court.—The court has authority—1. To direct and control the property of the county as it may deem expedient accord-

ing to law, and in this direction and control it has the sole power to locate the courts in the rooms of the courthouse and to designate the rooms to be occupied by the officers entitled to rooms therein, including the circuit judge, if resident in the county, and to change the location of the courts, and the designation of the rooms for officers, as it may deem best and most expedient, and this shall be done by order of the court entered upon the minutes of the court at a regular term of court. In the event the courthouse is inadequate to supply office rooms for such officers, the court may lease such office rooms in a convenient location in the county site and pay the rental from the county fund. *** "

Section 6755 of the Code of 1923 subsequently was amended by the Legislatures of 1931 and 1933 in respects not here material.

It will be seen from the above that the furnishing of offices in the courthouse is a matter under the direction and control of the county governing body. I know of no authority of law which makes it incumbent upon said governing body to furnish a justice of the peace with an office or space therein.

I am unable to find any provision of law relating to the location of an office of a justice of the peace other than Section 8706(3) of the Code of 1923, which provides that it shall be the duty of every justice of the peace to keep his office in the election precinct for which he is elected or appointed.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 6, 1939.

Hon. E. J. Fulmer,
Sheriff, Lauderdale County,
Florence, Alabama.

1. Sheriff cannot collect costs accruing in criminal cases in justice of peace courts from insolvent costs fund.—Code of 1923, Section 3850(2).

2. Guard allowance—The sheriff is entitled to guard allowance where the defendants are lawfully committed to jail in all misdemeanor cases begun by indictment, whether convicted or not and in all other cases where conviction follows arrest.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 24, 1939, in which you request my opinion as follows:

"Please send me your opinion on the following questions at the earliest possible date:

"Can the Sheriff collect Fine and Forfeiture out of a Justice of Peace Court?

"Can the Sheriff collect a jail fee when a case is nol prossed or found guilty in a misdemeanor case?"

I also have your subsequent letter of November 29, 1939, explaining your former letter, which is as follows:

"This is in receipt of your letter of November 27, 1939, regarding the question we ask you. We want to know your opinion on the following:

"Should the Sheriff collect Fine and Forfeiture out of a Justice of Peace Court?

"Should the Sheriff collect Guard allowance when a case is nol prossed or found not guilty in a misdemeanor case?"

I assume that your first inquiry undertakes to seek an answer to the question of whether or not the costs of a sheriff accruing in a criminal case in a justice of the peace court are legally payable out of the insolvent cost fund referred to in Section 3850(2) of the Code of 1923.

In answer to your first inquiry, I am enclosing copy of an opinion of this office rendered to Hon. B. P. Singleton, Chief Examiner of Public Accounts, on October 11, 1939. Paragraph 7 of this opinion answers this part of your inquiry fully.

The answer to your second inquiry, as explained by your letter of November 29, 1939, as to whether or not you are entitled to this guard allowance, will depend on whether or not the prosecution is begun by indictment and, if not, upon the final disposition of the case. I call your attention to Section 3741 of the Code of Alabama, 1923, which has to do with sheriff's fees and allowances in criminal cases in the circuit and county courts. Here we find the following provision:

"3741. Sheriff's fees and allowance;—sheriff to file application for fees, when.—Sheriffs are entitled to the following fees and allowances in criminal cases—that is to say: ***

"For guarding each prisoner lawfully committed to jail in the following cases:

" *** In all arrests under indictment whether convicted or not 2.00

In all other cases where convictions follow arrests ..... 2.00"

In the first instance above quoted, you are entitled to this allowance regardless of the outcome of the case. In the second instance, you are not entitled to the same unless the defendant is convicted.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 6, 1939.

Hon. A. L. Hasty.
Judge of Probate,
Marengo County,
Linden, Alabama.

Corporations—When a national bank is converted into a state bank, a charter fee, as provided for in Section 6969 of the Code of Alabama, 1923, must be paid.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for an official opinion dated November 23, 1939, which reads as follows:

"The First National Bank of Linden, Ala., a corporation organized and incorporated to do a general banking business under the national banking laws of the United States of America has been converted into a state bank known now as the First Bank of Linden, Ala.

"They just transferred the capital stock of the First National Bank to the First Bank of Linden, Ala. and since converting the bank, they have decreased their capital stock.

"Charter fee having been paid on The First National Bank at the time of incorporation, should a charter fee be paid now on the First Bank of Linden, Alabama?"

I answer your inquiry in the affirmative.

In your request, you state that The First National Bank of Linden, Alabama, was a corporation organized and incorporated to do a general banking business under the National Banking Laws of the United States. This being true, the said bank was not a private moneyed institution but was an agency of the United States and subject to the Federal laws governing national banks. **Ward vs. First National Bank,** 225 Ala. 10, 142 So. 93; **First National Bank vs. Weaver,** 225 Ala. 160, 142 So. 420.

The conversion of the First National Bank of Linden, Alabama, to a State bank known as the First Bank of Linden, Alabama, was accomplished

under the provisions of Sections 6424, 6425, 6426, 6427 and 6428 of Michie's Code of Alabama, 1928. It will be noted from a reading of these sections, supra, that in converting a National bank to a State bank, it is necessary that the conversion be approved by a vote of the stockholders owning not less than fifty-one per cent (51%) of the capital stock of the National bank. Further, that before the conversion can be completed, it is necessary to have the approval of the Superintendent of Banks of Alabama and before the Superintendent can give his approval, it is necessary that certain acts be performed, among which is the filing in the office of the pudge of probate of the county in which said State bank's place of business is located a declaration of incorporation. This is provided for in Section 6427, supra, which is as follows:

"6427. Declaration of incorporation; what shall show.—Before the issuing of such certificate by the superintendent of banks, a majority of the directors of such bank shall file in the office of the judge of probate of the county in which its place of business is located, a declaration of incorporation, which shall show: 1. The name to be assumed and used by the corporation. 2. The objects of the corporation, among which shall be the conversion of national banking association with the name and description of the same, into a state banking corporation, with all the power and authority that may be exercised by a corporation formed for the purposes of carrying on the business of banking and trust companies, under the laws of the State of Alabama. 3. The location of its principal office. 4. The amount of its total authorized capital, and the amount of its paid-in capital. 5. The name and postoffice address of each officer and director. 6. The time limit, if any, for the duration of the corporation. 7. A certificate, acknowledged before a notary public by a majority of the directors of the national banking association so converted that there has been transferred by the national banking association, by a vote of the stockholders owning not less than fifty-one per cent of the capital stock of such national banking association to such state banking corporation into which it is converted, all the property and assets of said national banking association."

From a reading of the above cited sections of Michie's Code, supra, and particularly Section 6427 hereinabove set out, it will be noted that when a National bank is converted into a State bank a new corporation is formed. The new corporation has the same powers and privileges, and is subject to the same duties, liabilities and regulations as prescribed for banks or banking corporations originally organized as banking corporations under the laws of Alabama. It is a new, separate and distinct entity with new powers, privileges and duties (**North Birmingham Lumber Co. vs. Sims and White,** 157 Ala. 595, 48 So. 84) and, therefore, subject to the charter fee as required by Section 6969 of the Code of Alabama, 1923.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 7, 1939.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Constitutional Law—Baldwin County—

Local Act No. 220, S. 286, approved March 28, 1931, Local Acts of 1931, page 83, held violative of Section 45 of the Constitution of Alabama, 1901, and is, therefore, null and void.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 31, 1939, in which you request my opinion as follows:

"Please refer to Sections 3740, 3750, 3762-3773 inclusive, and 4039, Code of Alabama, 1923 and Local Act No. 220 (Local Acts 1931, page 83) and advise me as follows:

"1. Is Local Act No. 220 Constitutional?

"2. If such act is Constitutional would the deficiency referred to in Section 2 apply to all claims against the Fine and Forfeiture Fund, such as witness fees, Clerk's fees and Sheriff's fees, or only to the deficiency in the amount due to the Special Deputy?"

My answer to your first inquiry is in the negative. It is my opinion that this act was passed in violation of Section 45 of the Constitution of Alabama, 1901, in that it contains two clearly defined subjects in both the title and the body of the act.

The title to the said act is:

"In reference to and to further provide for the Fine and Forfeiture Fund of the County of Baldwin, Alabama, by the transfer thereto of any surplus now in or hereafter accumulating in the County Solicitors Fund created by an act of this Legislature and provide the manner of transferring such surplus thereto, and to provide for the distribution of the surplus of such Fine and Forfeiture Fund, after the payment of all other claims and demands now or hereafter chargeable by law against such funds, first to the payment therefrom of the salary of a deputy sheriff for such county, in addition to and other than the deputy sheriff whose salary is paid out of the general fund of such county, and then by transferring any surplus remaining in such fund at the expiration of each sheriff's term of office, after the payment of all claims and demands now or hereafter by law chargeable against such fund including the salary of the deputy by this Act payable out of such fund, to the general fund of the county, and to fix the amount of such deputy sheriff's salary payable from such fund and the time and manner of the payment thereof, and to provide that any deficiency in the payment of such salary in any cal-

endar year or years may be paid from any surplus in such fund accruing in any succeeding year or years only during the term of office of the sheriff appointing such deputy."

First, the act seeks to regulate the Fine and Forfeiture Fund of Baldwin County by making certain provisions for the transfer of funds to the same. Second, it seeks to fix the salary of a deputy sheriff and provide the manner and mode of payment. In my opinion this constitutes two distinct subjects treated in the title of the act and in the body as well. Had the title of the bill contained two subjects and the body of the bill dealt with only one of them, then the one omitted could have been treated as surplusage. **State ex rel Porter v. Crook, Judge,** 126 Ala. 600, 28 So. 745; **Judson v. Bessemer,** 87 Ala. 240, 6 So. 267; **Gandy v. State,** 86 Ala. 20, 5 So. 420; **Thomas v. State,** 124 Ala. 48, 27 So. 315.

But when two subjects are expressed in the title and the body embraces both, the whole act must be treated as void. **Builders' and Painters' Supply Co. v. Lucas,** 119 Ala. 202, 24 So. 416; **Ballentyne v. Wickersham, 75 Ala. 533.**

Therefore, it is my opinion that the act must be held void and of no effect as violative of Section 45 of the Constitution of 1901.

Having answered your first inquiry as I have, it is unnecessary to answer your second.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 7, 1939.

Hon. J. A. Carnley,
Judge of Probate,
Coffee County,
Elba, Alabama.

Motor Vehicle License Tax Laws—Expense of administration—

Probate Judge must report and remit to State Treasurer percentage of gross receipts on account of motor vehicle license taxes, estimated by State Department of Revenue to represent expense of enforcement, and administration of motor vehicle license tax schedule, subject to adjustment at end of fiscal year.

Percentage is to be calculated on the gross amount of such taxes collected by Probate Judge.

Act No. 194, H. 324, approved July 10, 1935, General Acts, 1935, page 256 at page 528, as amended by Act of September 13, 1939, No. 397, H. 780.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion dated November 25, 1939, which reads as follows:

> "The State Comptroller, Hon. I. C. Heck, is requesting and demanding that the Probate Judge deduct 3¼% of the 30% of the automobile tag license funds allocated to the Towns and cities, and 3¼% of the 20% of the automobile tag license funds allocated to the county, and remit the same each month to the State Treasurer to cover expenses of collecting etc.
>
> "I have not as yet paid this 3¼% to the State and I am awaiting your opinion. I find that there has been no change in the law in this regard since 1935, and we have never deducted from the County's part (20%) and the City's part (now 30%) . . . I have not observed any opinion of the Attorney General authorizing such reduction of the County and City percentages for expenses incurred by the State, and in my opinion there is no authority for the Probate Judge to reduce these amounts by any estimated amount of expenses. I think the law requires the State to bear all such expenses. Please advise me at once."

I also have your amendment under date of December 5, 1939, as follows:

> "I wish to amend my request for your opinion as follows:
>
> "What authority in law has the Comptroller to estimate the costs and expenses of the state administration, and thus require payment according to such estimate before such expenses are known? Who has the right to fix the amount for the Probate Judge to pay?"

In my opinion, the Probate Judge must remit the amount estimated as necessary for the expenses of administering the tax law.

Schedule 158.19 of Section 348 of Act No. 194, H. 324, approved July 10, 1935 (General Acts 1935, p. 256 at p. 528) was amended by Act No. 397, H. 780, approved September 13, 1939, to provide for payment of 30%, instead of 20%, to cities and towns of the net proceeds of collections of motor vehicle license taxes, and in other particulars not necessary here to be considered.

In both the original and the amended schedule, it is provided that:

> "The money collected as motor vehicle and trailer license taxes, less all the expense necessary for the purchase and delivery of the motor vehicle tags required by this Act, the purchase and delivery of the blank receipts, license blanks and other printing necessary in the licensing and taxing of motor vehicles, and the salary of officers or employees engaged in such department, together with all other necessary expenses for the enforcement of this Act, shall be distributed as follows: *** "

It will be seen therefore that in each instance the act provided for distribution of the net proceeds, so to speak, of revenue derived from said sched-

ule, to wit: gross receipts, less all expense of enforcement and administration, consisting of the items above enumerated.

I am advised that in prior years there was no enforcement of the statute in this respect, but that, of course, does not estop the officers presently administering and enforcing the tax statutes.

Answering your second inquiry, it is my opinion that the power to supervise and control the administration of all the tax laws, vested in the State Tax Commission (now the State Department of Revenue) by Section 93 of Act No. 194, cited supra, is sufficiently broad to authorize the State Department of Revenue to make the necessary estimates as to the amount required to be deducted from the money collected as motor vehicle and trailer license taxes, in order to pay the expenses authorized to be paid by Schedule 158.19 of Section 348, as amended, supra.

The records in the office of the State Comptroller are the only source of complete information from which this estimate can be arrived at; and if the State Department of Revenue calls upon the Comptroller for such an estimate, which, when made, is approved by the State Department of Revenue, then the estimate is properly made. Upon being advised of said estimate and of its approval by the State Department of Revenue, it is the duty of the Judge of Probate, in my opinion, to pay into the State Treasury the amount directed by the State Department of Revenue for payment of said expenses.

The Comptroller has estimated that the expense of administration for the current fiscal year will amount to three and one-fourth (3¼) per cent of gross receipts under the schedule, subject to adjustment at the end of the twelfth month of said fiscal year. His estimate has been approved by the State Department of Revenue. This represents the expense to the State in the enforcement of administration of the act, and is therefore payable to the State.

The fact that the license year on motor vehicle licenses is from November 15 to November 14 (Opinion of Attorney General to Hon. L. W. Price, Judge of Probate, Conecuh County, under date of November 8, 1939) does not, in my judgment, affect the fiscal year, viz., October 1 to September 30.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 7, 1939.

Mrs. Theo F. May, Chairman,
Escambia County Board of Registrars,
Brewton, Alabama.

Poll tax—

Person not liable for poll tax during the time he is a bona fide resident of another state.

Opinion by Assistant Attorney General Vardaman.

Dear Madam:

I have your letter of November 16, 1939, in which you request my opinion as follows:

> "I am taking the liberty of writing you for an opinion regarding a certain phase of registering voters.
>
> "A citizen who formerly resided in this State removed to another State, and during his residence there reached the poll tax exemption limit by becoming 45 years of age. The party referred to recently returned to Alabama, this county, and desires to register, the question now arises will this party be liable for poll tax during his sojourn in another State from the time he moved there till he reached the age of 45?"

It is my opinion that your inquiry must be answered in the negative. Section 203 of the 1935 Revenue Act is as follows:

> "Section 203. There may be collected as hereinafter provided, from every person in this State, over the age of twenty-one years and under the age of forty-five years, not exempt by law, the sum of one dollar and fifty cents as poll tax, which shall be applied exclusively in aid of the public schools in the counties in which it is levied and collected."

See also Sections 178 and 194 of the Constitution of 1901.

The tax here levied is an annual tax on every person **in the state** over the age of twenty-one years and under the age of forty-five years. This office has heretofore held in an opinion of May 31, 1928, to Hon. G. W. Humphries, Judge of Probate, Baldwin County, Bay Minette, Alabama, Biennial Reports of Attorney General, 1926-28, page 566, that a person over twenty-one years of age and under forty-five years of age, living in Alabama, who had failed to qualify as a voter and who moved from the State of Alabama to the State of Mississippi, resided there for several years, and then moved back into Alabama, must pay all poll tax accrued against him after he became twenty-one years of age, **with the exception of such years as he was a citizen of the State of Mississippi.**

Therefore, it is my opinion that a person is not liable for poll tax in this state for the time that he was a bona fide resident of another state. However, I call your attention to the case of **Shepherd v. Sartain,** 185 Ala. 439, 64 So. 56, which held that "when any inhabitant of this state, subject to the payment of poll tax, leaves the state, for whatever length of time, **without acquiring a legal residence in a foreign state,** his payment of the poll taxes that fell due during the period of his absence from the state is prerequisite to legally voting upon his return to the State."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 7, 1939.

BEING RECONSIDERED

Hon. R. E. King,
Tax Collector,
Mobile County,
Mobile, Alabama.

Tax Collectors—Act No. 176, S. 117, approved April 21, 1936, General Acts, 1936, p. 205, as amended by Act No. 48, H. B. 208, approved February 2, 1937, General Acts 1936-37, p. 34, and as further amended by Act No. 163, H. B. 88, approved March 8, 1939, Pamphlet Acts of 1939, p. 264, no longer applies to Mobile County.

Under Section 220 of Revenue Act of 1935, court cannot continue cause without written consent by taxpayer.

Tax Collector to charge municipality with its pro rata share of advertising charges.

Tax Collector delivers only one certificate showing separately the amount of State and County taxes and municipal taxes.

Tax Collector's notices to delinquent taxpayers should comply strictly with Revenue Act of 1935.

Tax Collector—Probate Judge—Fees entitled to on tax sales.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of November 4, 1939, in which you request my opinion as follows:

"Please refer to Senate Bill No. 117 by Simpson, General and Local Acts, Extra Session 1936 approved April 21st, 1936, and House Bill No. 208 by McDermott, General and Local Acts, Extra Session 1936-1937, approved February 2nd, 1937, and House Bill No. 88 by Smyer, Regular Session 1939, approved March 20th, 1939, and advise me whether or not these bills are applicable to Mobile County.

"If in your opinion the above do not apply to Mobile County, please advise the writer what recourse other than the Board of Compromise, he has to be relieved of the $10.00 per day penalty for being late in making his final settlement, as it is humanly impossible to make or perfect the necessary services ten days before the beginning of the term of Court. Does the fact that the Judge of Probate, knowing the situation, will continue the cases without the tax payers written consent, relieve the Tax Collector of this charge?

"If in your opinion the above are applicable to Mobile County, please clear the following points up for me.

"First. Under your opinion rendered Hon. J. Collier Merrill, Tax Collector, Covington County, dated May 27th, 1939, in answer to his number 7 question, is the Tax Collector, if he so desires, permitted to make a separate notice, decree and docket sheet for the State and County Taxes and Municipal Taxes, or must it be incorporated all in one application, only showing the taxes and description separate. In other words, it is much easier and simpler to keep all records clear if the matter is this way, and as you have advised him in answer to his question number 12 that a separate advertisement must be had, I am under the impression that I can have separate operations, providing I make the sales at the same time.

"Second. Who is the Tax Collector to charge the advertising charges to that show on the certificate of sale? Is this amount to be charged to the State when the Probate Judge buys the Municipal taxes in for the State or does the Municipality have to pay the advertisement? After the sale has been made, who gets the certificate of sale? Can the Tax Collector give a certificate showing the amount that the State and County taxes sold for and another certificate showing the amount the Municipal taxes sold for?

"Please refer to Section 8 of House Bill 88 by Smyer, and advise me who is to award the advertising job. Does the Probate Judge or Tax Collector? As you know all advertising of tax sales must be published in the same paper. Would the publication by the Judge of Probate constitute the only notice necessary as to 'Unknown Owners', Non-Residents and Parties that have no address or can't be located.

"Am I right in the contention that the Tax Collector is entitled to the following fees? January 1st when taxes become delinquent .50c. Notice .25c. Making the tax sale .50c. The Judge of Probate fee as follows: A fee of .25c becomes due at the time the delinquent list is handed the Probate Court. On issuing a decree the Probate Judge is entitled to .25c. In other words does the entire amount of fees for both the Court and Collector amount to $1.75 for making a tax sale?"

In answer to your first inquiry, I am of the opinion that Act No. 176, S. 117, approved April 21, 1936 (General Acts 1936, page 205) was applicable to Mobile County. The population of Mobile County according to the last Federal Census was 118,363. This act applied to all counties having a population of 110,000 or more according to the last Federal Census. Section 1 of Act No. 176, supra, was amended at the 1936-37 session of the Legislature by Act No. 48, H. B. 208, approved February 2, 1937, (General Acts, 1936-37, page 34), so as to be applicable only to counties having a population of 200,000 or more according to the last Federal Census, thereby removing Mobile County from the operation of said act. Sections 8 and 9 of Act No. 176, supra, were amended at the regular session of the Legislature of 1939 by Act No. 163, H. B. 88, approved March 20, 1939, Pamphlet Acts of 1939, p. 264. Said amended act did not repeal Act No. 48, supra. It is, therefore, my opinion that Mobile County does not come within the purview of this act as amended.

I know of no way, except by decree of the Board of Compromise, for you to be relieved of the penalty referred to.

2. This office has ruled that the written consent of the taxpayer and the tax collector must be filed in the case and noted on the docket before the probate judge is authorized to continue beyond the term named in said

notice the hearing of a petition of the tax collector for the sale of lands for taxes. Quarterly Report of the Attorney General, Vol. XII, page 37.

In answer to your inquiry numbered "first", I am of the opinion that only one application is authorized and said application should contain a list of State and County taxes that are deliquent, and a list of municipal taxes that are delinquent. A careful reading of the opinion of this office to Hon. J. Collier Merrill, Tax Collector, Covington County, as of May 27, 1939, Quarterly Report of the Attorney General, Vol. XV, page 231, shows that it does not hold to the contrary. This opinion does hold:

> "A compliance by the tax assessor and the tax collector with the provisions of Act No. 300, H. B. 864, approved June 26, 1931, General Acts, 1931, page 337, will require the tax collector to separately describe the municipal property from the rural property, to state separately the municipal taxes, together with the interest and charges thereon, **but all in the same publication and not in separate publications. Only one publication is authorized** or required, although separate descriptions of the property and separate statements of the taxes, together with the interest and charges thereon necessarily follow from a compliance with the provisions of said act *** ." (Emphasis supplied)

In answer to your inquiry numbered "second", I am of the opinion that the tax collector is to charge the municipality with the costs of advertising for the sale of property for municipal taxes. The property is separately described in the publication and there would be no difficulty in determining the amount due by the municipality. I do not believe it was the intent of the Legislature, in the act requiring the probate judge to bid in the property in the name of the State for delinquent municipal taxes, to require the State to pay all of the costs of the advertising. The State in such cases would derive no benefit from the sale for municipal taxes as the State has no interest in such taxes.

In the case of **City of Opp v. Brogden et al.,** 236 Ala. 180, 181 So. 752, Mr. Justice Gardner makes the following observation:

> "It was not the legislative intent to **add any burden to the State and county** as to the enforcement of these tax laws or grant to the municipality any advantage other than that of economy and convenience in the use of State machinery in the matter of this tax enforcement." (Emphasis supplied)

It is obvious that if the State must pay the costs of advertising for the municipality that this is a burden on the State contrary to the intent of the Legislature.

Section 231 of Act No. 194, H. B. 324, approved July 10, 1935 (General Acts, 1935, page 256 at page 357), provides:

> "Section 231. As soon after the confirmation of sale is made as may be practicable, the Tax Collector must make out and deliver to each purchaser, other than the State, a certificate of purchase, which shall contain a description of the real estate sold and show that the sum was assessed by the Assessor, to whom assessed, the date of assessment for what year or years the taxes were due, the amount of taxes thereon,

distinguishing the amount due the State and County, and for school purposes, and the fees and costs; that it was advertised and how long; and that it was offered for sale, and at what time, and who became the purchaser, and at what price, and the fact and date of the confirmation of such sale."

Section 232 of said act provides in part:

"For the real estate bid off for the State in each case the Judge of Probate shall make out a certificate of purchase to the State of like import to the one provided for in the preceding section, and deliver the same to the Tax Collector who shall, on final settlement, deliver all certificates received by him from the Judge of Probate to the State Comptroller, who shall examine carefully all certificates of purchase of real estate where the same were bid in for the State at tax sale."

Section 23 of Act No. 300, supra, reads as follows:

"Section 23. The county tax collector shall embrace **in his certificate** to a purchaser under the provisions of law in regard to State and County taxes the amount of taxes due on the property described in the certificate to such City in the same manner and way as he is required to set forth in said certificate the amount due to the State and County." (Emphasis supplied)

It will be observed that only one certificate is given to the purchaser.

Section 8 of H. B. 88, supra, does not apply to Mobile County, but, as stated, it is only applicable to counties whose population is 200,000 or more according to the last Federal Census.

Section 219 of Act No. 194, H. B. 324, approved July 10, 1935 (General Acts, 1935, page 256 at page 354) provides:

"Section 219. The publication of notices under the preceding sections is governed by the provisions of this act relating to the publication of notices of sale of land, so far as the same may be applicable, and the tax collector may select the newspaper in which any notice under this article shall be given, but all legal notices relating to the sale of land for taxes shall be inserted in the same newspaper for the tax year."

You may select the newspaper in which the notices under these sections are given.

It is my opinion that, as Tax Collector, you should comply strictly with the provisions of Section 217 of H. B. 324, as amended pro tanto by Act No. 180, S. 170, approved April 21, 1936, (General Acts, 1936, p. 216), in and about serving notices on delinquent taxpayers, and that you should also comply with Sections 223 and 224 of said act with reference to notices of the sale of lands. In order for the tax sale to be valid, there must be a strict compliance with the statutes. Quarterly Report of the Attorney General, Vol. XII, page 79.

This office has ruled that the tax collector is required to collect a fee of fifty cents for the actual demand made on delinquent taxpayers, as provided by Section 162 of the 1935 Revenue Act. Quarterly Report of the Attorney

General, Volume I, page 330. This section also provides that the tax collector is entitled to a fee of fifty cents for making the sale.

Section 239 of the Revenue Act of 1935 provides as follows:

"Section 239. For each notice to a delinquent property owner to show cause why a decree of sale should not be rendered, the Judge of Probate is entitled to a fee of twenty-five cents and for each decree of sale, twenty-five cents; the Tax Collector shall have twenty-five cents for serving each notice which may be given by registered mail with return receipt demanded, but for his attendance at court, he shall receive no pay; but in case of appeal, the sheriff and the clerk of the appellate court shall be entitled to the same fees as for services in like cases."

It is, therefore, my opinion that the tax collector is entitled to the following fees:

1. For serving the demand notice made on delinquent taxpayers under Section 162 of the 1935 Revenue Act—$ .50.

2. For making the sale as provided by law—$ .50.

3. For serving the notice to a delinquent property owner to show cause why decree of sale should not be rendered—$ .25.

The judge of probate is entitled to the following fees:

1. For each notice to delinquent property owners to show cause why decree of sale should not be rendered—$ .25.

2. For each decree of sale—$ .25.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

December 7, 1939.

Hon. D. Trotter Jones, Chairman,
Alabama Boxing and Wrestling Commission,
P. O. Box 1069,
Montgomery, Alabama.

States—Alabama Boxing and Wrestling Commission.

Members of Commission entitled to reimbursement for all actual expenses while engaged in the performance of their duties as members of the Commission.

Recorder or Permits and licenses not authorized to pay such expenses unless members comply with Section 820 of the Code of 1923.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of November 27, 1939, in which you request my opinion as follows:

"An Act of the Legislature, Number 489, approved by the Governor on September 22, 1939, provides:

"'Section 5. Each member of the Commission shall serve as such without salary, but shall receive his actual expenses while engaged in the performance of his duties, etc.'

"I would like to know if each member of the Commission is limited to $3.00 per day expenses."

"I would like to know whether or not under this provision the Recorder of Permits and Licenses is authorized to pay such expenses without an itemized receipt for the same."

In answer to your inquiry I call your attention to the pertinent parts of Sections 5 and 19 of Act No. 489, S. 303 approved September 22, 1939, which read as follows:

"Each member of the Commission shall serve as such without salary, but shall receive his actual expenses while engaged in the performance of his duties, and a per diem of Ten ($10.00) Dollars per day, but not exceeding Six Hundred ($600.00) Dollars per annum. *** "

"All laws and parts of laws in conflict herewith, either special or general, except as herein otherwise specially provided, are hereby repealed, *** "

I am of the opinion that the members of the Alabama Boxing and Wrestling Commission are not limited to $3.00 per day expenses as provided in Act No. 87 H. 6, approved March 23, 1933 (General Acts 1933 p. 81).

This office in an opinion to Hon. Asa Rountree, Jr., State Director of Airfield Development, as of November 22, 1939 had occasion to pass upon a similar question and in holding that members of the State Aviation Commission, its aeronautical advisors and employees did not come within the purview of Act No. 87, supra, used the following language:

"The State Aviation Commission Act, being the last expression of legislative will on this subject, controls, and the provisions of Act No. 87, supra, are repealed insofar as they affect the members of the State Aviation Commission, its aeronautical advisors and employees. Consequently, the members of the State Aviation Commission, its aeronautical advisors

and its employees are entitled to be reimbursed for all actual and necessary traveling expenses and disbursements incurred by them while traveling on official business of the Commission, in accordance with the excerpt from Section 5 of the State Aviation Commission Act, quoted supra.

"Cf. Opinions to Hon. I. T. Quinn, Commissioner of Game and Fisheries, Capitol, under date of October 15, 1935, Quarterly Report of Attorney General, Vol. I, p. 74 and under date of April 3, 1936, Quarterly Report of Attorney General, Vol. III, p. 11; and to General John C. Coleman, Adjutant General, Capitol, under date of October 7, 1937, Quarterly Report of Attorney General, Vol. IX, p. 25."

I am of the opinion that under the provisions of the Act the Recorder of Permits and Licenses should require that all claims for actual expenses of members in the actual performance of their duties be itemized, verified by affidavit with vouchers therefor attached in compliance with Section 820 of the Code of Alabama 1923.—See opinion to Hon. Asa Rountree, Jr., State Director of Airfield Development under date of November 22, 1939, supra; and Quarterly Report of Attorney General, Vol. XV, p. 53.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 7, 1939.

Hon. W. L. Borders,
Sheriff, Calhoun County,
Anniston, Alabama.

When a sheriff procures in the State of Alabama the Governor's warrant to go to another state for a criminal charged with an offense and the return of the fugitive is refused by the Governor of the foreign state, then the sheriff would be entitled to his expenses to and from the capital of the foreign state in attempting to extradite and return the criminal to the State of Alabama.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 21, 1939, in which you request my opinion as follows:

"I will certainly appreciate your opinion in the following matter: On October 27, 1939, I, W. L. Borders, left here duly appointed as an agent for the State of Alabama to go to Thibodaux, Louisiana, to return one W. L. Ramsey, alias W. L. J. Ramsey to Calhoun County, Alabama, to answer an indictment charging him with damaging electric transmission lines. I went to Baton Rouge, Louisiana, to see Governor Earl K. Long to

get him to honor extradition, but he refused. The question I want to know is there any way I can get compensated for the expense that I was put to. I traveled 1296 miles and had hotel and board bill for five days. Will you please advise concerning this?"

It is my opinion that the sheriff would be entitled to reimbursement for his expenses in going to and returning from another state in attempting to extradite a person where the State of Alabama fails to extradite for the reason that the governor of the foreign state refuses to return the prisoner to the State of Alabama. If the crime be a misdemeanor, the county is liable for such expenses; if the crime is a felony, then the State becomes liable for same. Biennial Report of the Attorney General, 1934-36, page 277.

I call your attention to Section 24 of an act approved July 22, 1931, General Acts, 1931, page 559, known as the Uniform Extradition Law. You will note that this section says, among other things:

"When the punishment of the crime shall be the confinement of the criminal in the penitentiary or by death, **the expenses shall be paid out of the State Treasury.**" (Emphasis supplied)

I do not think the payment of these expenses is contingent upon the sheriff's being successful in his efforts to extradite the fugitive where he has made an honest effort to return the defendant to this State. I am basing this opinion on an opinion of this office written September 3, 1935, to Hon. Haygood Paterson, Sheriff, Montgomery County, Biennial Report of the Attorney General, 1934-36, page 277. In this opinion this office held:

"When the Governor issues his warrant for extradition papers for the purpose of bringing a defendant from another state to this state for trial of cases where the punishment is in the penitentiary or death, and when said prisoner is returned, the State must pay for such expenses regardless of whether the defendant is convicted or acquitted."

In extending the above opinion and based on the ruling there made, I call your attention again to Section 24 of the act approved July 22, 1931, General Acts, 1931, page 559, supra, which does not make such expenses contingent upon the officer's being able to return the fugitive from a foreign state. I do not think the Legislature ever contemplated a hardship of this character being placed on the sheriff. If we should hold otherwise, that is, make the sheriff guarantee that the governor of the foreign state would grant such extradition, few sheriffs would hazard any large expense in order to bring a criminal back to this state.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 7, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Department of Finance,
State Capitol.

Taxation—Receivers—Tax Collectors—

Property in the hands of a receiver appointed by the Court cannot be sold for taxes, except upon permission of the Court, wherein receivership is pending.

Tax Collector—Not chargeable with taxes which in good faith he failed to list as delinquent upon property in the hands of a receiver, in advance of timely application to require payment of such taxes by the receiver.

Action of Board of Revenue in undertaking to revise assessments for prior years upon property in hands of a receiver is void.

Until exhaustion of all remedies for collection of taxes on property in hands of receiver by intervention in the receivership proceedings no attempt should be made to charge the tax collector for failure, in good faith, to collect such taxes.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request of November 7, 1939, which follows:

"The Board of Revenue of Shelby County has issued each year to the Tax Collector of Shelby County a certificate of credit for taxes in litigation for the Montevallo Cotton Mills, Inc., covering taxes for the tax years 1931, 1932, 1933, 1934, 1935, 1936, 1937 and 1938.

"Upon investigation of these items it is reflected that the Montevallo Cotton Mills, Inc., under a bill filed in the Circuit Court of Shelby County, Equity Division, was declared insolvent and that it had ceased to function as a corporation, and for the purpose of liquidation, a Receiver was appointed on June 9, 1930, said Receiver being instructed to take charge, custody, and control of all property and assets of the Montevallo Cotton Mills, Inc., including its checks, papers, monies, lands, buildings, notes and accounts receivable, unpaid stock subscriptions, and all other property of any kind or description; and, under the decree so appointing, the Receiver was further authorized, empowered to take such other steps as may be reasonably proper for securing and preserving the assets and properties of said company, and he was expressly authorized to go to such reasonable expense as may be necessary for insuring said property and for doing such other things as may be necessary for its proper maintenance and preservation.

"The Court further ordered that all pending suits at the time and such suits as might be brought thereafter, were to be consolidated into

this Equity proceeding, and instructed the Register of the Court to ascertain all creditors of said corporation and that all persons and corporations, having any debts against said Montevallo Cotton Mills, Inc., or any liens or preferences against its property, must present and file with the Register of the Court, on or before September 1, 1930, a statement, under oath, of their claims against such corporation, such statements to be properly itemized and sufficiently full to show the consideration thereof, together with items composing the same, and presenting any liens or preferences as of any kind said creditors claim against said corporation or its property, and, upon their failure to do so, such claims shall be barred and of no effect.

"The original property of the Cotton Mills was assessed and taxes paid for the tax year 1930 on August 20, 1931. Assessment was not made by the Receiver for the tax year 1931, and same was assessed by the Tax Assessor as an Escape Assessment. For the tax years 1932-1938, inclusive, the property of the Montevallo Cotton Mills, Inc. was regularly assessed by the Receiver, the amounts of such assessments being approved by the Board of Review, with no objection as to valuations being filed by the Receiver.

"A careful check of the Tax Delinquent Dockets in the office of the Judge of Probate discloses the fact that in no year did the Tax Collector list the property of the Montevallo Cotton Mills, Inc. with the Probate Judge for a decree to sell same for taxes.

"A careful search of the records of the Circuit Court, in Equity, discloses the fact that no order was entered restraining the Tax Collector from proceeding to collect taxes due in any tax year.

"On or about August 1, 1939, the Board of Revenue, according to information obtained from the County Solicitor and Tax Collector, proceeded to set aside each and every assessment as to amount of valuation and substitute new valuations far less than the original assessments a was fixed by the Board of Review for each of the tax years above outlined, except the tax years of 1933 and 1934 on certain farm lands that were not included in the original assessment of the Cotton Mill site and buildings.

"Please refer to the above and advise me as follows:

"1. Due to the fact that the Montevallo Cotton Mills, Inc. had been placed in the hands of a Receiver for liquidation, would the taxes accruing each year on such company's property be taxes in litigation under conditions as above set out?

"2. Was the property of the Montevallo Cotton Mills, Inc., in liquidation, subject to be sold by the Tax Collector, through the Probate Court, when taxes thereon became delinquent and had not been paid.

"3. If so, and the Tax Collector has not yet asked for a decree of sale from the Probate Court, can application be made at this date for such a decree of sale to satisfy all the tax liens for the above mentioned tax years?

"4. If a decree of sale cannot be issued to sell said property to satisfy the liens for any one or more tax years delinquent, may suit be brought now in any court of competent jurisdiction to collect any or all of said taxes for the tax years referred to above?

"5. If any part of said delinquent taxes cannot now be collected by suit or otherwise, would the Tax Collector, whose duty it was to collect such taxes, and his official bond, be liable for any loss of revenue due the State, County and municipalities not properly collected?

"6. Would the Tax Collector, whose term expired September 30, 1935, and his or her official bond, be liable for the non-collection of taxes due for the tax years 1931-1934, inclusive, provided it is held that such taxes were not properly in litigation and the Collector failed to apply for a decree of sale at the proper time?

"7. Would the Tax Collector, whose term expired on September 30, 1935, and his or her official bond, be liable for the non-collection of taxes due for the tax years 1935-1938, inclusive, provided it is held that such taxes were not properly in litigation and the Collector failed to apply for the decree of sale at the proper time?

"8. In the event the Tax Collector, whose term expired on September 30, 1935, is liable for any and/or all of the taxes due for the tax years of 1931-1934, inclusive, could such Tax Collector enforce the tax lien in the manner set forth in Section 400 of the Revenue Code of 1935, within twelve months after same was charged to such Collector and demand for payment thereof made?

"9. Would the Tax Collector, whose term expired September 30, 1939, and his or her official bond, be liable for the non-collection of taxes due for the tax years 1931-1934, inclusive, provided it is held that such taxes were not in litigation, and the Tax Collector, whose duty it was to collect such taxes, failed to apply for a decree of sale at the proper time, and pass the duty on to the succeeding Tax Collector by claiming said taxes as being in litigation?

"10. If it is held that the Tax Collector, whose term expired on September 30, 1939, is liable for any and/or all of the taxes due for the tax years 1931-1938, inclusive, could such Tax Collector enforce said liens for taxes in the manner as set forth under Section 400 of the Revenue Code of 1935, within twelve months after same are charged to such Tax Collector and demand for settlement thereof made.

"11. Has the Board of Revenue of the County, the Circuit Courts of the State, the Commissioner of Revenue for the State, or any other Court other than U. S. Bankruptcy Court, after the close of a tax year, any authority to reopen an assessment for making adjustments in valuations?

"12. Would the Tax Collector, accepting an erroneous assumption of authority on the part of the Members of the Board of Revenue, have recourse against the Members of such Board and their official bond for any losses he or she may sustain by reason of acting in good faith, upon such assumed authority?"

Answer to your inquiries numbered 1 to 12 inclusive are best supplied, I believe, by a statement of the law with reference to property in the hands of receivers and taxation thereof.

> "Property in the hands of a receiver remains subject to assessment and to payment of all legal taxes thereon to the same extent as it was while in the possession of the owner, and such taxes are ordinarily to be regarded as a preferred and paramount claim over all other claims."

53 **C. J.** p. 243, Section 407—
In re: Tyler, 149 U. S. 164, 182; 43 S. Ct. 785; 37 L. Ed. 689.

It is also said:

> "It is the duty of the court not only to respect the paramount right of a claim for taxes, and to make no order for the distribution of assets **in custodia legis,** except in subordination thereto, but also to make such orders as will compel the receiver to discharge this obligation; and it is not necessary for the Court to await the end of the litigation, and until final decree."

53 **C. J.** p. 245, Section 411;
Union Trust Co. vs. Great Eastern Lumber Co., 160 C. C. A. 186, 248 Fed. 46.

The lien of such taxes is by operation of law transferred to the proceeds of sale in the hands of the receiver upon sale of the property. 53 **C. J.** p. 251, Section 421; **Union Trust etc. Bank v. Southern Traction Co.,** 283 Fed. 50.

The rule is, however, that any interference with the receiver's custody and possession of property in his hands under order of the court constitutes a contempt of court, and the rule is applied regardless of whether or not the person interfering was a party to the receivership or held a claim paramount to or subordinate to the right which the receiver was appointed to protect. **Ex Parte, Tyler, supra.**

Nor should the court, being a representative of the sovereign State, make any order for the distribution of funds in the hands of its receiver without providing also for the payment of taxes and levies owing to the State and its subdivisions. 53 **C. J.** 243, Section 407.

In view of this state of the law, I am of the opinion that the proper course of procedure in this matter is for the tax collector or someone representing the State, by petition to the court in which the receivership is pending, to seek an order authorizing and directing the receiver to pay all taxes accrued to date against the property in his hands.

I am of the opinion that until this is done and the petition heard and disposed of, no attempt should be made to charge the various tax officials in any way in respect of the delinquent taxes.

> "No rule is better settled than that when a court has appointed a receiver, his possession is the possession of the court, for the benefit of

the parties to the suit and all concerned, and cannot be disturbed without the leave of the court; and, that if any person, without leave, intentionally interferes with such possession, he necessarily commits a contempt of court and is liable to punishment therefor." **In re: Tyler, 149 U. S. 164, 181, supra.**

In the Tyler case, it is said:

"The general doctrine that property in the possession of a receiver appointed by a court is **in custodia legis,** and that unauthorized interference with such possession is punishable as a contempt, is conceded; but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, but this does not justify a physical invasion of such custody *** ."

" *** while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done."

Again in the same case:

"The tax collector is a ministerial officer, and no reason is perceived why he should not bring his claim to the attention of the court, while on the other hand it is clearly the duty of the receiver to do so, if he contends that the taxes are illegal. If found valid they must be paid; if invalid, the court will so declare, subject to the review of the appellate tribunals."

Inasmuch, therefore, as the tax collector, without first having obtained an order from the court in which the receivership is pending, was under no duty and was without power to sell the property in the hands of the receiver for payment of taxes, there is no basis at this time for charging him for failing to do so.

He should, however, by application or petition to the court in which the receivership is pending, pray for an order directing the receiver to pay all taxes heretofore assessed, and for sale of the property in his hands for such purpose in case of deficiency of liquid assets to pay such taxes; or for an order permitting the sale of the property for taxes in the manner provided by law.

It remains to be added that any attempt by the Board of Revenue, on or about April 1, 1939, as stated in your letter, to set aside assessments made in prior tax years and to "substitute new valuations for less than the original assessments," was futile.

State v. Doster Northington Drug Co., 196 Ala. 447, 71 So. 427;

State ex rel. Tallapoosa Co. v. Butler, 227 Ala. 212, 149 So. 101;

Quarterly Report Attorney General, Vol. IV, p. 95;

Opinion rendered to Hon. R. E. King, July 28, 1936.

It may not be improper to remark that in case the State and county should suffer injury or loss by reason of the failure of the tax collector seasonably to apply to the court for an order requiring the receiver to pay taxes on the property in receivership, after exhaustion of all assets in the hands of the receiver, recourse should be had to suit on the tax collector's bond.

And in case, by reason of any nonfeasance or malfeasance on the part of the receiver, it should be made to appear that the State and county had suffered injury or loss, recourse should be had to the receiver's bond.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

December 7, 1939.

Hon. John D. Stewart,
Sheriff, Coffee County,
Enterprise, Alabama.

Prohibition Laws—Condemnation Proceedings—Officers—

Pending condemnation proceedings, property seized under authority of Section 4778 of the Code of Alabama, 1923, by a municipal officer must be surrendered to the sheriff of the county in which such proceedings are pending.

Sheriff not authorized to use automobile seized under authority of Section 4778, Code of Alabama, 1923, pending condemnation proceedings.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your letter of November 17, 1939, in which you request my opinion as follows:

"When a municipal officer seizes an automobile for condemnation proceedings under the prohibition law and reports the same to the Solicitor under Section 4778 of the Code of Alabama of 1923, and the Solicitor files condemnation proceedings, in whose possession should the seized car remain pending the condemnation proceedings, or until the defendant or some other claimant makes a bond? Does an officer have the right to use a seized car pending condemnation proceedings?

"Such a case is pending in the Circuit Court of Coffee County, at Enterprise, at present and the municipal officers are retaining and using the automobile. If the duty rests upon me to preserve the automobile, either for the State or the successful party, please advise what steps I should take to obtain possession of it from the municipal officers."

It is my opinion that an automobile seized by a municipal officer under the authority of Section 4778 of the Code of Alabama, 1923, should, after the institution of condemnation proceedings as required by Section 4779 of the Code of Alabama, 1923, be surrendered by the municipal officer to the Sheriff of the county in which said proceeding is pending.

It will be observed from a careful reading of Sections 4778 and 4779, cited, that no mention is made as to who shall have possession of a seized conveyance or vehicle pending condemnation proceedings. However, Section 4780 of the Code of Alabama, 1923, sheds light on this question. This section is as follows:

"4780. Defendant or claimant may make bond for property seized.—Whenever a conveyance, vehicle of any kind or animal or harness used in drawing the same is seized by an officer of the state under the prohibition laws of this state, the defendant in the proceedings or the claimant of the property shall have the right to execute a bond in double the value of such property or of any item thereof, with good and sufficient surety, to be approved by the sheriff or the register of the circuit court and conditioned that in the event the said property is condemned, to deliver the same to the sheriff within fifteen days from the date of such judgment of condemnation, and to pay any difference between the value of said property at the time of the seizure and the time of the delivery to the sheriff after condemnation, such difference in value to be determined by the trial court upon motion of any party to said cause. **Upon the execution of such bond, the sheriff shall deliver said property to the defendant or claimant executing the same.** Upon the failure of the defendant or claimant to deliver the property condemned within fifteen days after judgment of condemnation, the bond shall be returned forfeited to the register of the circuit court and execution may issue thereon against the principal and his sureties for the amount of the value of such property; or in case of the return of the property to the sheriff and the failure to pay the difference in value as above set forth, execution may issue against the principal and his sureties for such difference in value." (Emphasis supplied)

It will be noted the above section provides that when a defendant or claimant to seized property makes bond as provided for therein, the sheriff must deliver said property to the person executing said bond. This section is not limited to seizures made under the authority of Section 4778, cited, by the sheriff but applies to seizures made by all officers. The fact that the sheriff must deliver to a defendant or claimant seized property upon the execution of a bond, necessarily implies that all property seized under the provisions of Section 4778, cited, must, pending the condemnation proceeding, be surrendered to and held by the sheriff. Necessary implication serves every purpose of a direct demand. **Swindle v. Crocker**, 217 Ala. 199, 115 So. 252.

As an additional reason, after condemnation is instituted in the circuit court the property is in custodia legis; and less otherwise expressly provided, it should be in the physical possession of the chief executive officer of the court, namely, the sheriff.

You next ask whether or not an officer has the right to use a seized automobile pending condemnation proceedings. I answer this question in the negative. The sheriff, as heretofore pointed out, must keep possession of a seized conveyance or vehicle pending condemnation proceedings, unless bond for such property is made as provided for in Section 4780, supra, and in my opinion has no authority to use the same while it is in his custody. Section 4782 of the Code of Alabama, 1923, makes provision for the reimbursement of an officer for the expense incurred in storing seized property pending the outcome of condemnation proceedings and this necessarily implies that the sheriff must store any property placed in his custody. I further call your attention to the fact that a defendant or claimant has title to such seized property until divested of same by decree of the Circuit Court and there is no provision of the law allowing the sheriff to use the property of another.

In answer to your last inquiry, beg to advise that if a municipal officer has possession of a seized conveyance or vehicle and will not surrender it to the sheriff, the Circuit Court has the right to enter an order directing that the said property be turned over to the sheriff pending determination of the condemnation proceedings. See Section 4779, Code of Alabama, 1923.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 7, 1939.

Hon. M. A. Cook,
Tax Asssessor, Greene County,
Eutaw, Alabama.

Taxation—Assessment of Taxes—Tax Assessor—

Upon the death of a taxpayer intestate, and without administration of his estate, the property belonging to his estate should be assessed for taxation in the name or names of all heirs, if known, of such deceased taxpayer.

If the names of all of the heirs are not known, or cannot be ascertained by diligent inquiry, then such property should be assessed in the names of such of them as are known or ascertained "and of the unknown heirs" of such decedent, (naming him). Act No. 194, H. 324, approved July 10, 1935, General Acts, 1935, page 256.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion under date of November 27, 1939, which reads as follows:

"I was elected Tax Assessor of Greene County and took office October 1st, this year. There are a number of cases among both the white and negro tax payers where the person died without leaving a will or without the estate being administered on in the Probate Court. The tax payer comes to assess this land and he perhaps owns an interest in the land but does not know the other heirs or maybe knows one or two of them. Please advise me how to assess this land so as to support a tax sale."

Section 40 of Act No. 194, H. 324, approved July 10, 1935, commonly known as the Revenue Act of 1935 (General Acts, 1935, page 256 at page 279) provides among other things that the property of deceased persons in case there be no personal representative, that is to say, no executor or administrator of the estate, shall be listed "by any person having an interest in the estate of said decedent by request or demise or under the laws of descent and distribution."

Therefore, if you are unable to ascertain the names of **all** the heirs owning an interest in the lands of a deceased person, but one or more of said heirs are known, such lands should be assessed in the name or names of the known heir or heirs and the other unknown heirs of decedent.

Section 44 of the Act aforesaid appearing on page 280 thereof, provides that "the assessor shall ascertain from inquiry or otherwise, the property and other subjects of taxation upon which such person is liable to be taxed, and shall list and make return thereof upon the proper blanks, and note upon such returns the failure of the owner after notice to make such return and the accrual of a penalty of ten per cent of the taxes to be assessed thereon."

As an example and illustration: If John Smith died before October 1 this year without a will and there is no administration of his estate, and if he left six heirs of whom you know one or more, but are unable to ascertain the names of the others, the assessment should be made in the name of **"William Smith and the other unknown heirs of John Smith, deceased."**

If William Smith or some other heir fails, after demand upon him to make an assessment, then under Section 44 of the act, you should make an inquiry and ascertain to the best of your ability the names of all the heirs and assess the property in the names of such of them as you may ascertain and "the other unknown heirs of John Smith, deceased."

Reference is made to an opinion of this office rendered on September 13, 1939, to Hon. John Ben Darden, Tax Assessor, Chambers County, Alabama, (Quarterly Report of Attorney General, Vol. XVI, page 236) for a full discussion of this question, and to Section 53 of the Revenue Act of 1935 prescribing your duties as to lands, some or all of the owners of which you are unable to ascertain after diligent inquiry and investigation.

In conclusion, it is my opinion that if you know the correct names of the heirs but are unable, after investigation, to learn the names of the other heirs, the assessment should be in the names of the known heirs (naming them), "and the other unknown heirs of" the deceased taxpayer last assessing the property for taxation (naming him).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 8, 1939.

Hon. Tom E. Head,
Sheriff, Covington County,
Andalusia, Alabama.

Sheriff's fees in condemnation cases—

The sheriff is entitled to a fee of $1.50 for serving each notice on property owners, as required by Section 7479 of the 1923 Code of Alabama and a fee of $5.00 for serving the Commissioners with notice as required by Section 7487 of the 1923 Code of Alabama.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion dated November 15, 1939, which reads as follows:

"The County of Covington has caused to be filed in the Probate Court of this county petitions for the exercise of eminent domain in the construction of a public road. Several of these petitions sought to condemn more than one tract (section 7478, Code of 1923) belonging to more than one party. I served separate notices (Code of 1923, 7479) upon the several owners as shown in the **one** petition which was filed. I also served notice upon the commissioners (7486-87, Code of 1923) of their appointment. The examiners have told the county officials that I am entitled to be paid only one fee for the several notices served upon the property owners whose property was included in the single or joint petition, that is, I am entitled to be paid as though I had served only one property owner. Such instructions are absurd on their face, but I am powerless to get my money without a ruling from you. Therefore please advise me as follows:

"(a) What is the amount of fee or fees to which I am lawfully entitled for serving each property owner with separate notice pursuant to the mandates of the above mentioned sections, the several tracts being incorporated in a single or joint petition? Am I entitled to a fee for each separate notice served on said property owners so included, and the amount thereof?

"(b) Advise the amount of fee to which I am entitled for serving notice upon the commissioners of their appointments?

"With reference to question (a) I wish to state that the original notice contained the names of all the property owners or other interested parties, but I served a copy thereof on each such owner, and made a joint return."

In my opinion your first question is answered by an opinion of this office under date of July 6, 1939 to Hon. W. G. Culp, Sheriff Chilton County, Quarterly Report, Vol. XVI, page 9, which holds that the sheriff is entitled

to a fee of $1.50 for serving notice or summons on each property owner in condemnation cases. A copy of this opinion is enclosed for your convenience.

In answer to your second inquiry, in my opinion you are entitled to a fee of $5.00 for serving the Commissioners with notice as required by Section 7487 of the 1923 Code of Alabama, which provides as follows:

"7487. Notice of appointment, service of.—When the court shall have appointed the Commissioners as herein provided, it shall at once issue a notice of the appointment to the sheriff, who shall serve such notice upon the person designated therein within five days of the receipt thereof, and the sheriff shall receive the same compensation for serving such notice as allowed for summoning jurors."

I call your attention to the fact that the section, supra, provides that the sheriff shall be allowed the same compensation for serving such notice as he is allowed for summoning jurors.

Under Section 7287 the Sheriff is allowed a fee of $5.00 for summoning a jury in probate courts in certain cases. Said section provides in part as follows:

"7287. Sheriffs are entitled to receive the following fees for the following services:

" *** Summoning a jury for any inquisition in the county, or **under a writ of ad quod damnum,** or dower, and attending on such jury, and taking inquest, per day, when no other provision is made by law ....$5.00."

It is, therefore, my opinion that you should be allowed a fee of $5.00 for serving the three commissioners as required by Section 7487 of the 1923 Code of Alabama.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 9, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Court of County Commissioners—Deputy Solicitor—

Court of county commissioners may furnish deputy solicitor's office in the courthouse with extension telephone if they deem it necessary for the proper performance of his duties.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of November 17, 1939, in which you request my opinion as follows:

> "I shall appreciate your giving me an opinion on the following question:
>
> "Is the Commissioners Court of Elmore County, Alabama, authorized to pay for the telephone services of an extension phone in the office of the Deputy Solicitor of said county?"

The court of county commissioners is vested with the authority to furnish the office of deputy solicitor in the courthouse with a **telephone** if said court so deems it necessary for the proper performance of the duties of his office. This authority is so vested by Act No. 187, S. 199, approved April 19, 1933, General Acts Extra Session 1933, page 201. The following opinions of this office have held this to be true:

> Opinion to Hon. W. C. Register, under date of November 20, 1935, Quarterly Report of Attorney General, Vol. I, page 193;
>
> Opinion to Hon. C. H. Strawbridge, under date of January 22, 1936, Quarterly Report of Attorney General, Vol. II, page 64;
>
> Opinion to Hon. R. E. Adams, under date of February 24, 1937, Quarterly Report of Attorney General, Vol. VI, page 88;
>
> Opinion to Hon. Geo. C. Johnson, under date of November 21, 1939, a copy of which is enclosed.

Naturally, we are now concerned with the question of whether or not this authority to "furnish a telephone" to the deputy solicitor's office in the courthouse extends to furnishing an **extension telephone to** this office. It is my opinion that this is a matter purely within the discretion of the court of county commissioners. Where the court is exercising a properly designated authority, a wide latitude of discretion is given. As also stated in **Matkin v. Marengo County,** 137 Ala. 155, 34 So. 171:

> "As a general rule in all cases involving the *** furnishing of county buildings, such as courthouses, jails and public offices, the court of county commissioners exercise a discretion which cannot be controlled by any judicial tribunal, in the absence of fraud, corruption or unfair dealing."

This rule has been reiterated in many cases before our Appellate Courts, among them being **Hays v. Alrichs,** 115 Ala. 239, 22 So. 465; **Powell v. Commissioners Court,** 34 Ala. 278; **Commissioners Court v. Bowie,** 34 Ala. 461; **Moore v. Hancock,** 11 Ala. 245, and **White v. Hewlett,** 143 Ala. 374, 42 So. 78.

It is my opinion, therefore, that the court of county commissioners may provide the deputy solicitor's office in the court house with an extension telephone if it deems it necessary for the proper performance of his duties. We have advised such courts in the opinions cited above that such practices should be carefully examined and prudently exercised.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 14, 1939.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
State of Alabama,
Capitol.

Bonds—The premiums on the additional bonds as required by the Board of Revenue or like county governing body under authority of Act No. 191, H. 344, approved April 20, 1933 (General Acts of 1933, Extra Session, page 203) should be paid by the county governing body out of the general funds of said county.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion dated November 28, 1939, which reads as follows:

"Kindly refer to your ruling under date of November 23, 1939, addressed to me, wherein you advised that the governing body of a County has the authority to require a Justice of the Peace to make an additional bond above $1,000 and, in further connection with this matter, please advise me in answer to the following question:

"1. If a Court of County Commissioners, Board of Revenue, or like County governing body should require a Justice of the Peace to make an additional bond above $1,000, and in such amount as may be determined by said governing body, who would have to pay the premium on this additional bond?"

In my opinion, the premiums on the additional bond should be paid by the county governing body out of the general funds of the county.

Section 14 of Act No. 191, H. 344, approved April 20, 1933 (General Acts, 1933, Extra Session, page 203) provides as follows:

"Section 14. The official bonds of Justices of the Peace, Notaries Public and Ex-Officio Justices of the Peace, Notaries Public, Constables

and County Surveyors shall be, as to each officer, in the sum of $1000.00 the premiums on said bonds to be paid by the person making such bond and without expense to the County."

In my opinion, the latter part of the section, supra, applies to the $1,000 bond, which premium should be paid for by the individuals.

Sections 16 and 20 of the said Act No. 191, supra, provide as follows:

"Section 16. That when in the judgment of the Court of County Commissioners, Board of Revenue or like governing body of any County any bond provided for in this Act is insufficient as to the penalty or the surety to fully protect the public interests and safeguard the public funds **such governing body** may require such officer to make an additional bond in such amount and with such sureties as may be approved by said governing body; provided the foregoing shall not apply to the County Superintendent of Education or the County Treasurer of public school funds, but when in the pudgment of the County School Board the bond of the Superintendent of Education or the County Treasurer of Public school funds of said county is insufficient either in penalty or surety to fully safeguard the public school funds, such County School Board shall require such officer to make additional bonds in such amounts and with such sureties as may be approved by said Board."

"Section 20. The premium on all bonds provided for in this Act, when made by surety companies, **shall be paid by the respective counties out of the general funds of said county,** except that the premiums on the bonds of Superintendent of Education and of the County Treasurer of public school funds shall be paid by the Board of Education of said County out of the three mill school tax and the premiums on all bonds of $1000.00 or less shall be paid by the officer making said bond."

In my opinion, it was the intention of the Legislature in passing this Act that premiums on the $1,000 bonds should be paid by the individual officeholders and the premiums on the additional bonds required by the county governing body should be paid by the county out of its general funds.

"The fundamental rule of construction is to ascertain and give effect to the intention of the Legislature as expressed in the stateute." **Alabama and Southern Digest,** Vol. 25, Statutes, Key No. 181, and cases cited thereunder.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 15, 1939.

Hon. John Brandon,
Secretary of State,
Capitol.

Elections—Publications of notices of changes in election districts held payable by the county.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of November 17, 1939, in which you request my opinion as follows:

> "We have received a statement and affidavit from the Birmingham News (Age-Herald) through the Board of Registrars of Jefferson County, covering advertisement of changes in the election districts in a precinct in Jefferson County. The notice was published in accordance with Section 432 of the Code of Alabama of 1923.
>
> "Please advise whether or not this is a charge against the State or the County. I request this opinion because of the fact that all proper charges incurred by the Boards of Registrars payable by the State are approve by me."

In reply, I wish first to refer you to the provisions of Section 432 of the Code of 1928 (Michie's Code), which provides as follows:

> "432. Notice of changes published and posted.—The judge of probate, within five days after the courts of county commissioners, or boards of revenue, or other governing boards of said county, file with him the boundaries of such election districts, and the names of the voting places therein, shall give notice of the same by publishing the same in some newspaper of general circulation published in said county, and having the same posted by the sheriff at the courthouse door and at two public places in said election district of such precinct. Such notice must describe such election district by its number and must specify the place therein where elections are to be held."

I wish to further refer you to an opinion of this office addressed to Hon. S. W. Hawkins, Chairman, Jefferson County Board of Registrars, under date of August 3, 1939, and reported in Vol. XVI of the Quarterly Report of Opinions of the Attorney General. This opinion holds in part as follows:

> "Sections 425-436 of Michie's Alabama Code of 1928 relate to precincts, voting places and boxes. Section 427 specifically places the duty of dividing election precincts into districts upon the county governing body. This duty is not transferred to the Chairman of the Board of Registrars of Jefferson County by Section 403, supra (Sections 425-436, supra, are not part of Article 3 of Chapter 19 of Michie's Alabama Code of 1928), nor is it transferred to him by the provisions of any other act of which we are aware. **Therefore, this duty is still vested in the county governing body of Jefferson County and should be exercised by it, and the expenses incurred in performing this duty should be paid just as the other expenses of the county governing body are paid.**" (Emphasis supplied)

Premises considered, it is my opinion that the expenses concerned in your request must be paid by the county, upon authority of the above cited opinion of the Attorney General.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 18, 1939.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Act No. 156, Senate Bill 143, approved March 16, 1939--

1. Act is constitutional.

2. Provisions of act apply only to those misdemeanors which constitute a violation of the State Highway Code, the State Highway Patrol Act, and the Rules of the Road.

3. It is necessary that a defendant plead guilty in order to invoke the provisions of the act.

4. It is also necessary that a defendant not take an appeal in order to invoke the provisions of the act.

5. The provisions or benefits of the act may be taken advantage of in:

a. Justice of the peace courts.

b. Courts created in lieu of justice of the peace courts.

c. Law and equity courts.

d. Courts of like jurisdiction.

e. Municipal and recorders' courts, when such courts are trying misdemeanants for the violation of the State Highway Code, the State Highway Patrol Act, and the Rules of the Road.

6. Provisions of the act cannot be invoked in circuit courts.

7. a. Trial fee as specified in the act does not include trial tax imposed under Section 9 of General Revenue Act of 1935.

b. Trial fee provided for in local act creating a special statutory court comes within the meaning of the act.

c. Fee of $5.00 provided for in Section 3758 "for a trial, entering judgment, etc." comes within the terms of the act.

d. Fee of $1.00 provided for trial of "each misdemeanor" in Section 3753 of the Code of 1923 comes within the provisions of the act.

e. Fee of 50c provided for in Section 3739 of the Code of 1923 "for each trial" comes within the provisions of the act.

f. Fee of 25c "for entering judgment" provided for in Section 3759 of the Code of 1923 comes within the terms of the act.

g. All solicitor's fees come within the terms of the act.

8. Date of the commission of the offense is immaterial in considering whether or not the terms of the act may be invoked.

Opinion by the Attorney General.

Dear Sir:

I have received several requests for opinions from you in which you seek a construction of the provisions of Act No. 156, Senate 143, approved March 16, 1939, which act deals with the taxation of fees in the various courts of inferior jurisdiction in this state, where a defendant pleads guilty to a violation of the State Highway Code, the State Highway Patrol Act, or the Rules of the Road, and takes no appeal.

The construction of the act here under consideration involves many very difficult questions, and I attempted to have the act amended so as to clarify certain of the provisions which, to my mind, are ambiguous. I was unable to secure passage of the amendatory legislation, however, and I find it necessary, therefore, to render an opinion construing this act in the best way that I can, in order that the various courts affected throughout the state will have at least something upon which to rely.

I do not maintain that all of the conclusions to which I have come in this opinion are correct. Such conclusions, however, have been reached only after a studied consideration of the several questions, and constitute my answers thereto.

This opinion is not limited to the questions which have been propounded by you, but contains a general discussion of many of the questions which have been raised by the clerks of the several inferior courts in the state.

1. Is the act constitutional?

I am of the opinion that the act is constitutional. The Court of Appeals of Alabama, in the case of **Richards v. State**, 190 So. 421, in considering this act, said as follows:

> "It is true that the title to the act, hereinabove set out, embraces fees charged in misdemeanor cases cognizable in certain courts of like jurisdiction, and that the enacting clause of the act omits many misdemeanors included in the title of the act. This does not affect the constitutionality of the enactment set out in Section 1 of the act. The title is broad enough to cover the legislation, and we see no reason why the enactment is not a valid exercise of the legislative will."

2. Do the provisions of the act apply where a defendant pleads guilty to the commission of any misdemeanor in any of the courts specified in the act and takes no appeal, or are the provisions of the act limited only to cases where a defendant pleads guilty to the commission of a violation of the State Highway Code, the State Highway Patrol Act, and the Rules of the Road in a court specified in the act and takes no appeal?

It is my opinion that the provisions of the act do not apply except in a case where a person is charged with a **misdemeanor** which is a violation of the State Highway Code, the State Highway Patrol Act, or the Rules of the Road. It is my opinion that a defendant who pleads guilty to the commission of any other misdemeanor triable in the courts specified in the act must be taxed with the same fees which were taxable prior to the passage and approval of said act. In other words, in a case where a defendant pleads guilty to the commission of a crime such as public drunkenness or simple assault in a court of the type specified in the act, and takes no appeal he is nevertheless chargeable with solicitor's fee, trial fees, and fees for entering judgment, just as he would have been if his plea of guilty and judgment of conviction had been entered prior to the passage and approval of the act. I call your attention to the fact that the title of the act and the body of the act are not exactly in accord in their provisions. The title of the act seems to include all misdemeanors which could have been tried in a justice of the peace court. The body of the act, however, limits the offenses to the type which I have heretofore referred to, but removes the limitation that it must have been an offense which was cognizable in a justice of the peace court.

The Court of Appeals in the case of **Richards v. State,** supra, took notice of the discrepancies between the title and body of the act, but concluded that they were not in any way fatal to the validity of the act.

3. Is it necessary that a defendant plead guilty in order to invoke the provisions of the act?

It is my opinion that this part of the act is clear, certain and unambiguous and, in my judgment, there is no question but that a defendant must plead guilty to the commission of an offense which violates either the State Highway Code, the State Highway Patrol Act, or the Rules of the Road, before he can receive the benefits of the act.

I do not believe that the defendant can receive the benefits of the act where he enters a plea of not guilty and is subsequently found guilty. The fact that after being found guilty he refuses to appeal does not enable him to come within the terms of the act.

4. Does the taking of an appeal by a defendant after a plea of guilty to the commission of an offense within the purview of the act preclude him from receiving the benefits of the act?

This question was discussed by the Court of Appeals in the case of **Richards v. State**, supra, wherein it was held as follows:

> "It gives the defendant, who pleads guilty, the benefit of exemption from certain costs, otherwise to be taxed, but it is perfectly plain that when a defendant takes an appeal after a plea of guilty, the exemptions named in the act do not apply."

5. In what courts may the provisions of the act be invoked?

In my opinion, the provisions or benefits of the act may be taken advantage of in justice of the peace courts, courts created in lieu of justice of

the peace courts, law and equity courts, and courts of like jurisdiction, where such courts have jurisdiction of the offenses, and the other provisions of the act are complied with, i. e., if a defendant enters a plea of guilty and does not appeal.

I do not think that the fact that a prosecution may be started as a result of an indictment returned to a statutory inferior court or statutory law and equity court presents a different case from where such a prosecution is started by affidavit and warrant. The act is silent as to any distinction to be made in regard to the method by which the prosecution was started. The limitation is placed on the courts rather than the method of commencing the prosecution.

6. Do the provisions of the act apply to circuit courts?

I do not believe that the act is applicable in the circuit courts of the state. I believe that the words used in the act, "or courts of like jurisdiction," refer to inferior statutory courts of the same type as those enumerated in the act, though they may be commonly known or referred to by the same title as the courts specifically enumerated. I do not believe that the mere fact that some of the courts which come under the act have jurisdiction concurrent with the circuit court in certain cases brings the circuit court within the operation of the act.

I believe that the act under consideration will extend to municipal and recorders' courts, when such courts are trying misdemeanants for the violation of the State Highway Code, the State Highway Patrol Act, and the Rules of the Road.

Section 1945 of the Code of 1923 reads in pertinent part as follows:

> "The recorder shall have original and concurrent jurisdiction with the county court or courts of like jurisdiction, of all misdemeanors committed within the city or town, or within the police jurisdiction thereof. *** "

Your attention is called to the fact, however, that when a municipal corporation has adopted by ordinance the provisions of the State Highway Code, the State Highway Patrol Act, and the Rules of the Road, and a recorder's court is trying a defendant for violating one of the above enumerated provisions of law, then, such a defendant would not be entitled to the benefits of the act under consideration, for in such a case the recorder's court would be trying a case which involved a breach of a city ordinance rather than trying the defendant for an offense against the State of Alabama.

Section 1946 of the 1923 Code of Alabama provides that when a recorder, under the provisions of Section 1945, supra, convicts a person of a misdemeanor against the State, the limits of the punishment shall be those imposed by the State law for the offense.

7. What fees or costs is a defendant relieved from paying where he enters a plea of guilty to an offense specified in the act in a court included within the terms of the act, and takes no appeal?

The act uses the following language: "No fees shall be taxed or collected in said courts for trial, solicitor's fee, or entering judgment in such cases."

It is necessary, therefore, to consider each of the particular fees enumerated separately.

a. Trial fee.

In view of the fact that the act is not applicable to cases in the circuit courts, the trial fee referred to in the act does not include the trial tax imposed under the provisions of Section 9 of Act No. 194, House Bill 324, approved July 10, 1935, General Acts, 1935, pages 256, 263.

It is my opinion, however, that a trial tax provided for by a local act creating a statutory court of such a character as comes within the terms of the act, must not be taxed where a defendant pleads guilty to commission of an offense contemplated by the act and does not take an appeal.

This conclusion is borne out by the fact that in the case of **Richards v. State,** supra, the Court of Appeals inferred that the trial fee therein dealt with could not have been collected if the defendant had not appealed.

It is my opinion that the fee of $5.00 provided for in Section 3758 "for trial, entering judgment, and when an appeal is taken approving bond and certifying proceedings," cannot be taxed when the conditions of the act are complied with. This is a fee which is provided for in county courts. I think that any other fee of a simlar nature would likewise be untaxable where the conditions of the act are met.

I doubt if the Legislature intended to prevent a justice of the peace from collecting the fee of $1.00 provided for in Section 3753 for "each trial of misdemeanor."

It is my opinion, however, that the act itself does not in any way indicate that this was the legislative intent and, therefore, I am constrained to hold that where a case of the kind here dealt with is disposed of in a justice of the peace court that the $1.00 fee just above referred to cannot be taxed and collected.

I also have doubt if the Legislature intended to prevent the clerk from collecting the fee of fifty cents provided for in Section 3739 of the Code of Alabama "for each trial." There is nothing in the act, however, upon which to base such a conclusion, and I am, therefore, constrained to hold that such a fee cannot be collected where the provisions of the act are invoked.

b. Fee for entering judgment.

It is my opinion that no fee can be taxed for entering judgment where the conditions of the act are complied with. Here again I have serious doubt as to whether or not the author of the bill as originally drafted contemplated that a clerk should lose the twenty-five cent fee provided for in Section 3739 of the Code of Alabama, 1923, for entering judgment against each defendant. There is nothing in the act, however, which indicates that the Legislature

intended that the provisions of the act not apply to this fee, and I am, therefore, constrained to hold that a clerk is not entitled to collect the fee of twenty-five cents provided for in that section.

c. Solicitor's fee.

It is my opinion that no solicitor's fee of any kind shall be taxed in any of the courts covered by the provisions of this act, where the requirements of the act are complied with.

8. Can a defendant who pleads guilty to an offense contemplated in the act and takes no appeal receive the benefits of the act when the offense to which he pleads guilty was committed prior to the date of the adoption of the act, to-wit, March 16, 1939?

I am of the opinion that the date of the commission of the offense has no effect on the right of the defendant to obtain the benefits of the act. If he pleads guilty and takes no appeal, then it is my opinion that he should not be taxed with those fees discussed heretofore in this opinion.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 19, 1939.

Hon. Matt Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Probate Judge—Fiduciary Funds—Commissions on Disbursements—

1. Probate Judge entitled to one and one-half per cent. commission on funds coming into his hands under provisions of Article 11, Chapter 299, Code of 1923, commission to be deducted on disbursement of funds.

2. Probate Judge not entitled to commission on funds received or paid out under the provisions of Article 11, Chapter 352 of the Code of 1923.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated December 13, 1939, which reads as follows:

"Would like to know whether I am to deduct commissions on Fiduciary Funds upon receiving same or upon final payment of same. Upon receiving these funds it has been the custom to make an entry in the Fiduciary Fund Book of the amount received, at the same time deducting commissions, the remainder to be paid out.

"The State Examiners are now auditing our books, and the question is whether we should deduct commissions upon receiving monies or upon final payment of same."

From the facts contained in your request, I am unable to determine whether you refer to funds coming into your hands under the provisions of Article 11, Chapter 299 of the Code of 1923, or funds coming into your hands under the provisions of Article 11, Chapter 352 of the Code of 1923. For this reason, I will deal in this opinion with the provisions of both of the above referred to articles.

I am of the opinion that you are entitled to a commission of one and one-half per cent. on funds coming into your hands under the provisions of Article 11, Chapter 299, supra, such commission to be deducted upon the final distribution of such funds.

Your attention is called to Section 8254 of the Code of 1923, which reads in pertinent part as follows:

" *** for receiving and paying out such money, he shall be entitled to a commission of one and one-half per cent."

It appears from the wording of the above quoted portion of Section 8254, namely, "for receiving and **paying out** such money," that the probate judge is not entitled to the commission as therein provided until the monies have been finally disbursed.

I am of the opinion that the Probate Judge is not entitled to any commission or fee whatsoever for receiving or paying out monies coming into his hands under the provisions of Article 11, Chapter 352, supra.

I have examined all the sections which compose Article 11, Chapter 352, supra, which are sections 10458 to 10466 inclusive, and nowhere in said article is there any mention made for any fee or commission to be paid to the Probate Judge for receiving and paying out monies coming into his hands under the provisions thereof. Neither do I find any fee or commission for receiving or paying out such funds under the provisions of Section 7285 of the Code of 1923, which section contains the general schedule of fees to which probate judges are entitled.

The laws of fees and costs are penal in nature, and no fee must be charged or collected unless there is some expressed authority for charging and collecting such fee. Section 7255, Code of Alabama, 1923; **Mobile County v. Williams,** 180 Ala. 639, 61 So. 963; **Copeland v. Jefferson County,** 192 Ala. 12, 68 So. 258.

Cf. Opinion rendered to Matt A. Boykin, Probate Judge, Mobile County, on June 14, 1938, Quarterly Report of Attorney General, Vol. XI, page 109.

You are, therefore, advised that you, as Probate Judge, are not entitled to any fee or commission for receiving and paying out monies coming into your hands under the provisions of Article 11, Chapter 352, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 20, 1939.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Counties—Governing Bodies—Donations—

A county governing body is not authorized to make donations or contributions to organizations purporting to conduct educational programs regarding the evils of Communism.

Such bodies may exercise only such powers as are expressly granted to them by law.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for an official opinion dated December 13, 1939, which reads as follows:

"There is an organization in the State known as the Southern Negro Institute which, according to my information, maintains offices in several cities and towns, and has as one of its purposes a so-called educational program among the negroes of the State to enlighten and inform them regarding the evils of communism. This, I understand, is the primary, if not the sole purpose of the Institute. They do not conduct what we commonly know or refer to as educational courses, in the generally accepted educational sense.

"I should like to be advised in answer to the following question:

"1. Can a County Commission, Board of Revenue, or similar county governing body legally donate county funds to the Southern Negro Institute?

"I am advised that some of the counties believe they have authority to make donations to this Institute on the grounds that its business is educational work."

I am of opinion that a county governing body cannot legally donate county funds to the Southern Negro Institute or any such similar organization as mentioned in your letter.

Such bodies are strictly confined to the exercise of powers expressly granted to them by law and I find no provision of law or statute under which such donations, contributions, appropriations or payments may be made.

Please see Quarterly Report, Attorney General, Vol. XVI, p. 199, rendered August 30, 1939, to Hon. G. H. Howard, Judge of Probate, Elmore County, Alabama; **Rice, County Treasurer v. Foshee,** 19 Ala. App. 421, 97 So. 764; **Ensley Motor Co. v. O'Rear,** 196 Ala. 481, 71 So. 704.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 20, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Taxation—License Taxes—Sawmills

The license tax payable for operation of a sawmill is to be determined upon the basis of the mill's capacity, rather than the average daily production of the mill. Acts 1935, p. 256, Sec. 348, Schedule 123.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion dated December 8, 1939, which follows:

"We have a party in this county operating a sawmill with a thirty horsepower motor and in issuing the license for this mill, the operator stated that the capacity of same was less than 5000 feet per day and the license was issued on this basis. He has now been cited to take out a larger license due to the fact that some days this mill cuts more than 5000 feet and other days less than 5000 feet per day. Please advise us whether or not the capacity should be based on the average daily output for any day during the season. Your usual prompt attention will be appreciated."

Schedule 123 of Section 348 of Act No. 194, H. 324, approved July 10, 1935, commonly known as the Revenue Act of 1935 (General Acts, 1935, page 256) imposes the license tax required to be paid for operation of a sawmill.

Said schedule provides that the tax shall be "according to capacity."

If, therefore, the sawmill referred to in your letter has a capacity of more than 5000 feet per day, it should be taxed upon the basis stated in the schedule, that is to say, if its capacity is more than 5000 feet and not exceeding 10,000 feet per day, the privilege tax is $25.00.

The fact that some days the mill does not produce 5000 feet is immaterial. The only question is: How many thousand feet is it capable of producing? From your statement it is evident that it has a capacity of more than 5000 feet daily and should be taxed accordingly.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 20, 1939.

Hon. D. Trotter Jones, Chairman,
Alabama Boxing & Wrestling Commission,
P. O. Box 1069,
Montgomery, Alabama.

Alabama Boxing and Wrestling Commission—

Members of Commission are allowed per diem of Ten Dollars per day while performing their duties not to exceed Six Hundred Dollars per annum.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of December 8, 1939, in which you request my opinion as follows:

"Section 5, Act of the Legislature, No. 489, approved September 22, 1939, provides as follows:

"'Each member of the commission shall serve as such without salary, but shall receive his actual expenses while engaged in the performance of his duties and a per diem of $10.00 per day, not exceeding $600.00 per annum.'

"I would like to know whether or not 'per annum' refers to the State fiscal year, October to September, or to the calendar year."

In answer to your inquiry I call your attention to Act No. 489, S. 303, approved September 22, 1939, Section 3 of said Act reads in pertinent part as follows:

" *** The members of the Commission shall consist of a Chairman of the Commission and two Associate Commissioners, each of whom shall be appointed by the Governor and shall be subject to removal at the pleasure of the Governor, with or without cause. **The Chairman shall be appointed for a term of six years, and one Associate Commissioner for two years,** and thereafter their respective successors shall be appointed for a term of six years. They shall take the same oath of office and may be impeached and shall be commissioned as other State officers, but they shall not be required to reside in Montgomery County, Alabama." (Emphasis supplied)

Section 5 of said Act provides as follows:

"Each member of the Commission shall serve as such without salary, but shall receive his actual expenses while engaged in the performance of his duties, **and a per diem of Ten ($10.00) Dollars per day, but not exceeding Six Hundred ($600.00) Dollars per annum.** The Chairman of the Commission shall be ex-officio the Recorder of Permits and Licenses and for his services as such shall receive one-third of all monies collected." (Emphasis supplied)

The phrase "per annum" is a Latin term meaning a period of twelve months. 3 Corpus Juris Secundum 1390.

It will be observed that the term of the members begins on the day of their respective appointments and their first terms are six, four and two years.

The Act does not say that the members are to receive their per diem during the **fiscal year,** but on the contrary says they are to receive not exceeding **$600 per annum.**

It is, therefore, my opinion that the members of the Alabama Boxing and Wrestling Commission are allowed while engaged in the performance of their duties a per diem of Ten Dollars per day not to exceed Six Hundred Dollars during the twelve months after their respective appointments to the office. See Quarterly Report of Attorney General, Vol X, p. 186.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 20, 1939.

Mrs. Martha D. Holman, Member,
Sumter County Board of Registrars,
York, Alabama.

Registrars—Not permitted to register persons during time for purging list of registration.

Board meets on first Monday in January of even numbered years for the purpose of purging the list, and continues in session one week.

Board meets on the second Monday in February of even numbered years, and remains in session one day for the purpose of making final its action in purging the registration list.

Opinion by Assistant Attorney General McCall.

Dear Madam:

I have your request for an official opinion under date of December 11, 1939, which is as follows:

"The six (6) days in January, 1940 for Purging list—are we allowed to register anyone during that period? And when can we strike other than the time set?"

In answer to your inquiry, I call your attention to Section 392 of the Code of 1923 as amended by Act No. 460, H. B. 926, approved September 13, 1935, (General Acts of Alabama, 1935, p. 989), which provides:

"Section 392. TIMES FOR PURGING LIST OF REGISTRATION. The board of registrars shall meet in each county on the first Monday in January, 1936, and every two years thereafter, for purging the registration list, and may continue in session one week. The names of those who have died, become non-residents of the State, become insane, and been so declared by inquisition of lunacy, or who have been convicted of any offense mentioned in Section 182 of the constitution since being registered, or otherwise disqualified as electors under the provision of the constitution, and any names which may have been fraudulently entered on such list, shall be stricken from the registration list. Any member of the board who neglects or wilfully refuses to perform the duties herein required of him shall be guilty of a misdemeanor and on conviction, shall be punished by a fine of not more than Five Hundred Dollars ($500.00) and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months. That when said Board of Registrars have sufficient evidence furnished them that any elector has permanently moved from one precinct to another in any County said Board of Registrars shall transfer the name of such elector to the registration list of the precinct to which such elector has moved."

Your attention is called to Section 393 of the Code of 1923 as amended by Act No. 289, S. 179, approved August 20, 1927 (General Acts, 1927, page 274), which provides:

"Section 393 (324) NOTICE AND HEARING WHEN NAMES ARE TO BE STRICKEN FROM LIST. When the name of any elector is proposed to be stricken from the registration list, unless he or she is dead or is a non-resident of the State, notice shall be issued to him or her by the board of registrars, citing him or her to appear before the board on the second Monday in February, following, and show cause why his or her name should not be stricken from the list. Said notice shall be served by the sheriff at least five days before the second Monday is February. The board of registrars shall in addition to the above notice give notice in some newspaper published in the county by one insertion."

A careful reading of the two sections, supra, fails to disclose any authority of the Board of Registrars to register persons, that otherwise may be entitled to register, during the meeting of the board for the purpose of purging the registration list or during the meeting of the board for the purpose of making final its action in purging the registration list. Biennial Report of Attorney General, 1932-34, page 452.

Your board must meet on the first Monday in January of each even numbered year for the purpose of purging the list and continue in session for one week. Quarterly Report of Attorney General, Vol. III, page 215. Your board must meet on the second Monday in February of each even numbered year and remain in session one day for the purpose of making final its action in purging the registration list. Quarterly Report of Attorney General, supra.

There are no other statutes other than the ones cited in this opinion that authorize the board of registrars to meet for the purpose of purging or striking names from the registration list.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 20, 1939.

Hon. E. W. Vance,
Member, Board of Revenue,
Barbour County,
Eufaula, Alabama.

The county is without authority of law to pay for the services of a detective to apprehend the person or persons who broke into and robbed the office of the judge of probate or pay a reward for the apprehension of such person.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 8, 1939, in which you request my opinion as follows:

"The office of the Judge of Probate of Barbour County has been robbed several times this fall, without the authorities being able to locate the thief. The Grand Jury here this week spent considerable time in trying to find out the guilty party. Their report to the court—**recommended the employment of a detective by the Board of Revenue to try to ascertain** the guilty party.

"Question: Please advise me if the Board of Revenue has the authority to pay a reward—or compensate a detective for his service in making an investigation."

I know of no law that authorizes the county to pay for the services of a detective to apprehend the person or persons who broke into the office of the judge of probate and committed robbery, nor is the county authorized to pay a reward for the capture of such person or persons. This office in an opinion to Hon. Frank O. Deese, Judge of Probate, Dale County, Ozark, Alabama, written January 7, 1937, Quarterly Report of Attorney General, Vol. VI, page 14, held that the county was without authority to pay a fingerprint expert in an effort to detect a robbery of the probate office of Dale County and I think the two cases are analogous.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 22, 1939.

Hon. Grady R. Williams,
Judge of Probate,
Lauderdale County,
Florence, Alabama.

Counties—

Counties have authority to pay from the general fund a part of the administrative expenses of the offices of the Disaster Loan Corporation and the Farm Security Administration operating in the respective counties.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 15, 1939, in which you request my opinion as follows:

"The committee of the Disaster Loan Corporation and the Farm Security Administration have been working for some time approving the loans that have been made in this County. The Court of County Com-

missioners would like to pay a part of their expense as they have had to work much more than as required of them, owing to the conditions of the farm families in this County. Is it possible for us to make an appropriation for this, as it is in my opinion used for agricultural purposes?"

In answer to your inquiry, it is my opinion that a county has authority to pay from its general fund a part of the administrative expenses of the offices of the Disaster Loan Corporation and the Farm Security Administration operating in said county.

The function of the Disaster Loan Corporation is to provide loans made necessary by floods or other catastrophes in the years 1936, 1937, 1938, 1939, and 1940. The chief purposes and duties of the Farm Security Administration are to carry out the farm tenant aid program under Title I of the Bankhead-Jones Farm Tenant Act, which authorizes loans to competent farm tenants, share-croppers, and farm laborers to enable them to become farm owners. Under this program loans are made to destitute and low-income farm families for the purchase of farm supplies, equipment, and livestock, for the refinancing of indebtedness, and for family subsistence. Such loans are limited to families on relief or near relief that are unable to obtain adequate credit from any other source. Each standard loan is accompanied by a farm and home management plan providing for intelligent farm operation and soil conserving practices. Emergency loans and grants are made in cases of extreme distress in farm areas devastated by drought, flood, or similar catastrophes. The Farm Security Administration has also taken over resettlement projects from its predecessor agencies. (United States Government Manual, October, 1939, pp. 272, 167, 168).

From the above it will be seen that these agencies make loans for relief purposes and for the purposes of promoting agriculture. Therefore, the county has authority to appropriate from its general funds monies to help support the administrative operation of these agencies, under the authority of Subsections 6 and 23 of Section 6755, Code of Alabama, 1923, as amended by Acts of 1931, page 759. These subsections are as follows:

"Section 6755. Authority of court. The court has authority— *** (6) To make such rules and regulations for the support of the poor in the county as are not inconsistent with any law of the state. ***

"(23) To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agriculture, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agriculture, industrial, and manufacturing plants, factories and other industries in their respective counties. *** "

The above is in accordance with former rulings of this office which hold that the counties have authority to expend their funds to aid in the program of Federal aid and relief projects in their counties. Opinion of the Attorney General to the Judge of Probate of Talladega County, under date of November 29, 1939, (copy enclosed); Biennial Report of Attorney General, 1934-36, page 661; Quarterly Report of Attorney General, Vol. X, page 132; Quarterly Report of Attorney General, Vol. IX, page 93; Biennial Report of Attorney General, 1932-34, pages 595, 629. I wish to call your particular attention to the opinion found in Quarterly Report, Vol. X, page 132, supra, which holds

specifically that the county governing bodies are authorized to pay the salary of an assistant to the Farm Security Administration out of the general fund of the county.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 22, 1939.

Hon. I. J. Browder, Director,
Department of Personnel,
Montgomery, Alabama.

Merit System Act—

Clerk of the Supreme Court held not subject to the provisions of the Merit System Act.

Reporter of Decisions, stenographer to Reporter of Decisions, Librarian and Marshal of the Supreme Court and Court of Appeals, assistant Librarian, assistant Clerk of the Supreme Court, secretaries of the justices of the Supreme Court, the secretary or execution clerk of the Supreme Court, and secretaries or clerks of the Court of Appeals, all held subject to the provisions of the Merit System Act.

Clerk of the Court of Appeals held subject to all provisions of the Merit System Act except those relating to the establishment of pay plans, such clerk being, during his present term, within the protection of Section 281 of the Constitution.

Clerk of the Supreme Court held not entitled to appoint confidential assistant or secretary.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of October 7, 1939, in which you request my opinion as follows:

"I will thank you to advise me at your earliest convenience whether or not the following State officers and employees of the Supreme Court and Court of Appeals are subject to the provisions of the Merit System Act, including the provisions permitting the regulation of compensation of certain officers and employees:

"SUPREME COURT.

"Clerk of the Supreme Court appointed by the Supreme Court for a term of six years under Section 164 of the Constitution and Section 10319 of the Code.

"Reporter of Decisions appointed by the Supreme Court for a term co-extensive with Justices of the Supreme Court under Section 10331 of the Code.

"Librarian and Marshal of the Supreme Court and Court of Appeals appointed by Justices of the Supreme Court under Section 10307 of the Code.

"Assistant Clerk of the Supreme Court appointed by the Clerk of the Supreme Court under Section 10328 of the Code, as amended by an Act of the Legislature of 1927 (General Acts 1927, p. 710).

"Secretary or Execution Clerk of the Supreme Court appointed by the Clerk of the Supreme Court under Section 10329 of the Code, as amended by Acts, 1927 (General Acts 1927, p. 710).

"Secretary of the Chief Justice appointed by the Chief Justice under Section 10293 of the Code, as amended by General Acts, 1927, p. 674.

"Three secretaries of the Supreme Court appointed by the Chief Justice and Associate Justices to hold for the current term of the Chief Justice under Sections 10304 and 10306 of the Code, as amended by Acts 1936-37, page 246.

"Assistant Librarian appointed by the Librarian under Section 10308 of the Code.

"Stenographer to Reporter of Decisions appointed by the Reporter of Decisions under Section 10333 of the Code.

"COURT OF APPEALS.

"Clerk of Court of Appeals appointed by the Judges for a term of six years under Section 7332 of the Code.

"Secretary for the Court appointed by the presiding judge and the other judges for the current term of the presiding judge under Section 7331 of the Code.

"Assistant Clerk for the Court of Appeals appointed by the Court under Section 23, General Acts, 1923, page 793.

"Temporary clerk assigned to the Court of Appeals employed by the Court with the approval of the Governor under Section 765 of the Code.

"Your opinion is also requested as to whether or not the Clerk of the Supreme Court is entitled to select a confidential secretary or assistant under the provisions of Section 10 of the Merit System Act.

"I am making this request because of circumstances attending the decision as to whether or not these officers and employees come under the provisions of the law.

"The Supreme Court decision upholding the constitutionality of the Merit System Act seems to me to indicate that we can not make exceptions in the case of the Judiciary Department.

"Yet at least two of the Justices have indicated to me that it is their private opinions that the Court Attaches may properly be considered exempt. At the same time they have shown a fine spirit of cooperation, and have designated confidential Secretaries, to be so considered in case Court Attaches are included.

"I shall appreciate your clarifying this situation for us at an early date."

Before answering your inquiry, may I state that this opinion must be deemed solely as a construction of the statutes and an interpretation of the decisions by the writer, and it must not be understood that this office, a division of the executive branch of the government, is in any sense attempting to dictate the policies of the judiciary or to limit the powers to be exercised by the judicial branch of our government in any degree. In answering your inquiry, this office is attempting to interpret the statutes in the light of accepted statutory construction and of what I believe the Supreme Court of Alabama has already declared the law to be.

Of course, the conclusions reached in this opinion cannot bind the Supreme Court in any further action which it may take upon the question if presented to it at some future date in the manner provided by law, but until the Court again expresses itself as a tribunal, we are of the opinion that you should proceed as hereinafter directed.

There are several rules of statutory construction to which recourse may be had to determine whether or not the provisions of the Merit System Act apply to the officers and employees mentioned in your letter. Among these rules to which resort may be had to determine the legislative intent, probably the one best to be trusted where ambiguity exists is the legislative history of the statute as reflected by the Journals of the Legislature which enacted it. The intention of the 1939 Legislature to include within the operation of the Merit System Act, these officers, attendants and employees of the Supreme Court and the Court of Appeals (with exceptions hereinafter noted) is clearly shown by the Legislative Journals. Senate Bill 44, which became the Merit System Act, as originally introduced in the Senate, included in the "exempt" classification "officers of courts of record." By committee amendment, this category was extended and made more specific by the use of the following terminology: "Officers, attendants and employees of courts of record, clerks of county jury boards, deputy circuit solicitors, assistant attorneys general, and special assistant attorneys general."

Senate Bill 44 passed the Senate containing this amendment. The Ways and Means Committee of the House, upon consideration of the exempt category, saw fit to recommend to the House adoption of a substitute which exempted the following:

> "Officers, attendants and employees of the Circuit Courts, clerks of county jury boards, and deputy circuit solicitors."

This amendment was adopted by the House and concurred in by the Senate, and is now subsection 3 of Section 10(a) of the Merit System Act. Here we have a clear expression of the legislative wishes in this matter. They have shown unequivocally their intention to include within the Merit System Act the officers, attendants and employees of the Court of Appeals and the Supreme Court concerning whom you inquire (except the Clerk of the Supreme Court, as will hereinafter be shown), by striking from the exempt category all reference to such offices or places of employment.

The contention has been advanced, however, that inasmuch as the Constitution provides for the Supreme Court and such inferior courts as may be from time to time established by the Legislature, and inasmuch as both the Constitution and the statutes impose upon such courts certain duties, that such provisions necessarily imply that these judicial bodies should have the power to select, without interference from any other agency, the subordinates and assistants necessary to the execution of these functions. It is advanced that those provisions of the Merit System Act, even assuming that it was the legislative intention to subject officers and employees of the courts to the act, which undertake to make it applicable to subordinate officers and empolyees of the courts, are violative of the Constitution.

This proposition was advanced in support of the contention of the Comptroller that the Merit System Act was unconstitutional in the case of **Heck v. Hall,** 190 So. 290, (Adv. Sheets). In the Attorney General's brief for the Comptroller, the point was squarely presented to the court in the following language:

> "The Constitution provides for the offices of Attorney General, State, Auditor, Secretary of State, State Treasurer, Commissioner of Agriculture and Industries and Superintendent of Education, and the Constitution and the statutes impose upon them certain duties. We respectfully submit that the creation and imposition of duties upon these offices by the Constitution and the statutes necessarily imply that they should have the power to select, without interference from any other agency, the subordinates and assistants necessary to the execution of these functions. We think that these provisions of the 'Merit System Act' which undertake to make it applicable to subordinate officers and employees in the office of the constitutional officers named are violative of Sections 70, 112, 134 and 137 of the Constitution.
>
> "**The same argument is even more applicable as to the subordinate officers and employees of the courts.** By the terms of the 'Merit System Act' it purports to apply to all subordinate officers of the Court of Appeals and the Supreme Court. Of course, Section 164 of the Constitution provides how the Clerk of the Supreme Court shall be selected, and the act cannot apply to him. But the Marshal of the Supreme Court, the stenographers and secretaries of the Supreme Court and secretaries and

stenographers of the Court of Appeals which are provided for by law ought to be selected by the courts or the justices or judges without interference from an executive agency. It is the function of the courts to select their employees, which the Legislature constitutionally cannot delegate to an executive agency. This is particularly true with the Clerk of the Court of Appeals. Section 164 of the Constitution, in spirit if not in letter, provides for the selection by the appellate courts of their own clerks and, by necessary implication, that section applies to the Court of Appeals. **We respectfully submit that those provisions of the act which purport to make themselves applicable to the subordinate officers and employees of the Supreme Court and Court of Appeals are unconstitutional and void."** (Emphasis supplied)

The Court replying to the argument stated:

"Of course, there is no approach to merit in the contention that the act contravenes Sections 1, 70, 112, 134, 137, 139, 164, and 166 of the Constitution of the state. The total lack of merit in such a contention may readily be seen by referring to these sections. Any contention that to impose civil service, or merit provisions, upon incumbents of constitutional offices in the exercise of their power to appoint subordinates is an unconstitutional interference with their powers as constitutionally established officers have received the attention of the courts, and the contention held to be without merit. People v. McCullough, 254 Ill. 9, 98 N. E. 156, Ann. Cas. 1913 B, 995."

Further expressing itself in the opinion, as applicable to this inquiry, the Court has stated:

"A careful reading of the Constitution will disclose nothing to indicate that the Legislature, **in dealing with offices and employments of its creation** did not possess a free hand in imposing qualifications upon those who would aspire to appointment to such offices and employments. The right to create necessarily carried with it the right to prescribe lawful qualifications to the end that the state should be served only by capable and efficient public servants. ***

"It has been suggested that some of the provisions tend to disturb the independence and separateness of the judiciary. True, under our system the government is divided into executive, legislative and judicial, but no one department, so far as respects the Merit System established by this act, can be said to rank over and above another. We find nothing in the Constitution which tends to a lack of equality in this regard. All are agencies of the State engaged in the promotion of good government."

If additional authority need be cited to support that which we interpret to have been the conclusion reached by the Supreme Court, the following quotations from **State ex rel. Buell v. Frear,** 146 Wis. 291, 131 N. W. 832; **Rogers v. Buffalo,** 123 N. Y. 73, 25 N. E. 274; and **People v. McCullough,** 254 Ill. 9, 98 N. E. 156 (cited by the Supreme Court of Alabama as authority for its conclusion), should suffice:

In the case of **State ex rel. Buell v. Frear,** 146 Wis. 291, 131 N. W. 832, 34 L. R. A. (N. S.) 480, 489, the court says:

"We perceive no unreasonable restriction in the nature of this regulation for the exercise of the discretion of the appointing officer to select an appointee found to possess the qualifications pursuant to the tests prescribed by the law. The tests are to be practical in their nature and appropriate to ascertain the fitness and skill of the applicant, and impose no unreasonable conditions or restrictions on the appointing officer in the exercise of his power, and clearly serve to aid him in selecting competent servants."

The Wisconsin court concludes:

"We are persuaded that, if the statute is administered within the limits of the provisions as therein prescribed by the legislature, it in no way infringes upon the rights of the appointing officers in making their selections and appointments to the public service."

A statement of the New York court in **Rogers v. Buffalo**, 123 N. W. 73, 25 N. E. 274, with reference to the Civil Service Law of that state is also here applicable.

"Looking at it as a matter of common sense, we are quite sure that the framers of our organic law never intended to oppose a constitutional barrier to the right of the people through their legislature to enact laws which should have for their sole object the possession of fit and proper qualifications for the performance of the duties of a public office on the part of him who desired to be appointed to such office . . . Statutes looking only to the purposes of ascertaining whether candidates for an appointive office are possessed of those qualifications which are necessary for a fit and intelligent discharge of the duties pertaining to such office are not dangerous in their nature, and in their execution they are not liable to abuse in any manner involving the liberties of the people."

In **People v. McCullough**, 254 Ill. 9, 98 N. E. 156, Ann. Cas. 1913 B, 995, the Illinois Supreme Court had before it the identical questions here presented. The court concluded that, notwithstanding that Article 3 of the Illinois Constitution declared that the powers of government were divided into the legislative, executive and judicial departments and prohibited one department from exercising any power belonging to either of the others and notwithstanding the further fact that Article 5 of the Illinois Constitution declared that the executive department should consist of enumerated officers, including the Secretary of State, and required the Secretary of State to perform specified duties and duties as may be prescribed by law, the Legislature of Illinois had the power to place the assistants of the Secretary of State under the operation of the Civil Service Statutes. While I would like to here quote the entire opinion which is so applicable to the conclusions at which we have arrived, we deem it more desirable for the sake of brevity to commend it to your attention as positive authority for the conclusions herein reached. I would like, however, to call your attention to the following apt statement of the Illinois court:

"The duties which the officer (the constitutional officer dealt with in the opinion) is required to perform concerned the state. He must perform them, not because he has contracted to, but because the law has imposed them on his office. The employees who assist him are not his employees but employees of the state. The work they are engaged in is

the work of the state. They are in the public service—not private service. The state and not the officer employs them and pays them, and he is not liable for their negligence." (Citing cases)

The Illinois court, in further rejecting the contention that constitutional officers had certain inherent appointing power that could not be interfered with by Civil Service regulations, also said:

"It is the undoubted law that the legislature may pass any law and do any legislative act not prohibited by the constitution of the state or the United States. It is equally true that the power to appoint to office is not inherent in the executive department unless conferred by the constitution or the legislators, but the creation of officers, the delegation and regulation of the powers and duties of officers and the prescribing of the manner of their appointment of election are legislative functions which are restrained only by the constitution.

"The fact that such officers (the secretary of state, the treasurer and other executive officers, including the governor) are created by the constitution does not confer unrestricted power upon them, and except as to such rights and powers as they derive from the various provisions of the constitutions, they are entirely subject to the will of the legislature."

Again the Court sagely observes that the act "is based on the principle that positions in the public service are not the personal or political perquisites of any officer or party, and ought not be divided, after a political campaign, as so much loot of actual warfare, but that competency, merit and fitness ought to be the standard for all appointments or promotions in the public service. That principle is not out of harmony with the general spirit, any specific provisions or any implied doctrine of the constitution of Illinois."

The conclusion must necessarily be drawn, therefore, from the authorities quoted and from the legislative intention, that the Reporter of Decisions, the stenographer to the Reporter of Decisions, the Librarian and Marshal, the assistant Librarian, the assistant Clerk of the Supreme Court, the secretaries of the Supreme Court, the secretary or Execution Clerk of the Supreme Court, the Clerk of the Court of Appeals, and the three secretaries or clerks of such court, are all subject to the provisions of the Merit System Act and the control of the Personnel Board and the Personnel Director, except in so far as Section 281 of the Constitution inhibits such regulation and control as hereinafter pointed out.

The provisions of the Merit System Act are inapplicable to the Clerk of the Supreme Court, since provision is made under Section 164 of the Constitution for the appointment of the Clerk of the Supreme Court, and as stated in **Heck v. Hall,** supra, "The act *** makes no effort and it was not the legislative mind, to restrict in any manner the functions, duties or compensation, either as to the amount or mode of payment, of constitutional officers, who are in that regard unaffected thereby."

Mr. Justice Knight, speaking for the Court in the case of **Heck v. Hall,** correctly cautioned against any attempt by the State Personnel Board to adopt rules and regulations attempting to alter the compensation of officers of the State protected from such salary amendments by Section 281 of the Constitution, stating:

"While the act confers upon the Personnel Director and the State Personnel Board, with the approval of the Governor, the authority to fix and establish a 'pay plan' for all employees in the state service, to include for each class a minimum and maximum rate of pay and such intermediate rates of pay as the Director considers necessary or equitable; nevertheless in the establishment and enforcement of such 'plan', Section 281 of the Constitution cannot be overlooked or disregarded. While the Legislature permits offices of its creation to continue, those holding the same, with fixed terms and at fixed salaries, are protected by said section of the Constitution from any diminution of salary, and likewise by the same section of the Constitution, their salaries cannot be increased, during the term for which they were elected or appointed."

Section 281 provides as follows:

"The salary, fees, or compensation of any civil officer holding any civil office of profit under this state or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

It is my opinion that, while the Personnel Board may establish pay plans for all of the officers and employees named in your inquiry, with the exception, of course, of the Clerk of the Supreme Court, such plans cannot be applicable to the present incumbent Clerk of the Court of Appeals, for this officer is protected by Section 281 of the Constitution, being appointed for a fixed term under the provisions of Section 7332 of the Code of 1923, and having a salary fixed by law.

In my opinion, the other officers and employees of the Court of Appeals and the Supreme Court inquired about cannot be held to come within the portection of Section 281. The Reporter of Decisions, although specifically declared to be an officer of the Court, does not have a fixed term of office within the meaning of Section 281 in that, while appointed for a fixed period, he is nevertheless subject to removal at any time, with or without cause, by the Supreme Court. **State ex rel. Rumbold v. Gordon,** 142 S. W. 315 (Mo.). See Section 10331 of the Code of Alabama, 1923. See **Touart v. State,** 173 Ala. 453, 56 So. 211. While it is true that by Act No. 418, approved September 13, 1939, Section 10332 of the Code of Alabama, 1923, was amended to increase the salary of the Reporter of Decisions, and while this act was passed subsequent to the enactment of the Merit System Law, it is not necessary here to discuss whether said amendment superseded the provisions of the Merit System Act, insofar as the establishment of a pay plan for this officer by the Personnel Board is concerned, for the reason that by Act No. 552, approved September 19, 1939, it is specifically provided that:

"All provisions of the Merit System Act, approved March 2, 1939, shall be applicable to all of the State officers and employees covered thereby at the time of its enactment, any other statutes or provisions of law subsequently enacted to the contrary notwithstanding."

The Marshal and Librarian also hold at the will of the Court and cannot be said to have a definite term of office. See **Touart v. State,** supra. See Section 10307 of the Code of 1923. Also see Act No. 416, approved September 13, 1939, increasing the salary of Marshall and Librarian containing the follow-

ing proviso indicative of the Legislative intention not to remove such officer from the Merit System Act:

> "It is the Legislative intent that if the position of Marshal and Librarian is subject to the pay plan as set out in said Merit System Act, it shall remain so subject, anything herein to the contrary notwithstanding."

The assistant Librarian cannot be held an officer, since he is merely an appointee of the Librarian and certainly no provision is made by statute for his term of office. See Section 10308 of the Code of 1923. Even assuming the assistant Clerk of the Supreme Court to be an officer, which is not here decided, it not being necessary to your inquiry, Section 281 affords the incumbent no protection in that such incumbent has no term of office, being employed by the Clerk of the Supreme Court and subject to dismissal by such officer, under Section 10328 of the Code of 1923. Neither the secretaries of the Justices of the Supreme Court nor those of the Court of Appeals nor the stenographer to the Reporter of Decisions nor the stenographer or execution clerk (employed under Section 10329 of the Code by the Clerk of the Supreme Court) can possibly be held to be officers with fixed terms of office.

You are, therefore, respectfully advised that, with the exception of the Clerk of the Supreme Court, to whom the Merit System Act does not apply, and the Clerk of the Court of Appeals, whose compensation may not be increased or decreased by the Personnel Board until the expiration of his term of office, the provisions of the Merit System Act are applicable in all respects to the general officers and employees mentioned in your inquiry. Lest any confusion arise, let it be here said that it is my opnion that the Clerk of the Court of Appeals is subject to all the provisions of the Merit System Act save those relating to compensation, and that the provisions relative to compensation may be made applicable to that office at the expiration of the term of the present incumbent.

While the question is not here presented, we deem it advisable for your information to advise you that under the provisions of Section 10, certain of these employees **may be** appointed by the Supreme Court or the Court of Appeals as confidential assistants or secretaries, in which event, of course, such employees would come within the Unclassified service and would not be subject to those provisions of the Merit System Act relating to appointment or dismissal, although subject to its provisions in other respects.

You next inquire whether the Clerk of the Supreme Court, a constitutional officer, appointed by the judges of the Supreme Court, under the provisions of Section 164 of the Constitution and Section 10319 of the Code, is entitled to appoint a confidential assistant or secretary under the provisions of Section 10 of the Merit System Act.

The applicable portion of Section 10 is as follows:

> "The Unclassified Service shall include: (1) One confidential assistant or secretary for each Board, Commission or elected officer."

By the express provisions of the Constitution and the statutes relating to the Clerk of the Supreme Court, he is an "appointed", not an "elected"

officer. In my opinion, there is no room for the enlargement or extension of the term "elected officer" as that term is used in the above quoted provision. It applies only to those officers **elected,** and in my judgment, an appointment by the judges of the Supreme Court is not parallel in effect to an election, as that term is used in the statute. It would appear that to determine the purpose of the proviso permitting elected officers to have a confidential assistant or secretary, it must be read in connection with the first part of Section 10, which defines the exempt service to include "officers elected by vote of the people."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 23, 1939.

Dr. J. N. Baker, Secretary,
State Board of Medical Examiners,
Montgomery, Alabama.

Statutes—Chiropodists—

The reference in Section 2837 of the Code of Alabama, 1923, as amended by Act No. 448, H. 525, approved September 21, 1939, to "The Alabama Association of Chiropodists" is to the Alabama Association of Chiropodists, a corporation organized in Jefferson County, Alabama, under date of August 18, 1939.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of December 5, 1939, in which you request my opinion as follows:

"The Legislature of 1939 amended Section 2837 of the Code of Alabama of 1923 for the purpose of providing legal status for those practitioners of the healing art dealing solely with the ailments of the human foot. It will be noted from this amendment, a copy of which is hereto attached, that the State Board of Medical Examiners, as now set up in the Medical Practice Act, is vested with the authority to promulgate the rules and regulations necessary to make this Act operative.

"In this Act it will be noted that the State Board of Medical Examiners is to appoint an examiner or examiners to aid it in its work and that such examiner or examiners are to be selected from the membership of the Alabama Association of Chiropodists.

"A confusing question has arisen in the minds of the Board as to what constitutes the Alabama Association of Chiropodists, inasmuch as

two similar organizations have, at different times, been set up in this State. Certain documents bearing on the legal status of these organizations are being submitted to you, together with certain other papers purporting to show that one of these organizations has been legally dissolved.

"The State Board of Medical Examiners, in the discharge of its legal responsibilities, would like to have your office advise us as to which of these organizations should be recognized as constituting the Alabama Association of Chiropodists."

I have been furnished with the declaration of incorporation of the "Alabama Association of Chiropodists" under date of August 18, 1939, a corporation organized in Jefferson County, Alabama, under the provisions of Section 7167, as amended, of Article 23 of Chapter 274, of the Code of Alabama, 1923. The charter members, the trustees and the officers of said corporation are, respectively, as follows:

G. E. Clark,
H. S. Carter,
E. P. Sealy,
Geo. W. Benitez,
W. L. Draper,
J. B. White,
T. L. Wright,
Herstyne Watson,
Herman Oxford,
A. L. Sealy,
C. H. Crowley;

G. E. Clark,
W. L. Draper,
Herman Oxford;

H. S. Carter,
Geo. W. Benitez,
E. P. Sealy,
A. L. Sealy.

This declaration of incorporation was filed for record in the office of the Judge of Probate of Jefferson County on August 26, 1939, and was duly recorded by him. The records of the Secretary of State show that the incorporation of this corporation has been reported to that office as required by law.

I have also been furnished with a dissolution agreement of the "Professional Association of Alabama Chiropodists", a corporation, under date of August 13, 1939, which dissolution agreement was filed for record in the office of the Judge of Probate of Jefferson County on September 21, 1939, and was duly recorded by him. The records of the Secretary of State show that a report of the dissolution of this corporation has been duly made to that office.

The records of the Secretary of State do not reveal the existence of any other corporation of chiropodists in this State, and I have not been apprised of the existence of any other body by that name in this State, incorporated or not, and, therefore, I assume that there is no other such body known by that name in this State. Upon that assumption, I am of the opinion that the reference in Section 2837, as amended, supra, to the Alabama Association of Chiropodists is to this corporation, the charter members, the trustees and the officers of which are set out hereinabove.

Consequently, it is my opinion that this corporation should be recognized by you as constituting the Alabama Association of Chiropodists referred to in the act, from the membership of which the examiner or examiners mentioned in Section 2837, as amended, supra, should be appointed by the State Board of Medical Examiners.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 23, 1939.

Hon. A. D. Sherill,
Tax Collector, Colbert County,
Tuscumbia, Alabama.

Redemption—

Property owner seeking to redeem land sold to the State for taxes must deposit with Probate Judge of County in which land is situated, the amount of money for which the land was sold for taxes, with interest at the time said property was sold, together with the amount of all taxes found to be due on said land since date of sale.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated November 20, 1939, which reads as follows:

"I request a ruling from you upon the following question: A property owner assesses his property for 1939 and this assessment was charged to me on the Tax Assessor's abstract. Subsequent to the time the assessment was made the property was sold to the state for the nonpayment of 1938 tax. Now, the taxpayer desires to redeem from the State his property and I would like to know whether this taxpayer can pay the 1939 tax in my office as the Assessor's abstract for 1939 is practically finished before the sale of 1938 tax is made, which is in June of 1939.

"In other words, in redeeming this property, can the taxpayer pay the 1938 and interest and cost to the Probate Judge and then pay the 1939 tax in my office according to the assessment for 1939 and according to the abstract of the Tax Assessor and thereby redeem his property in this manner?"

In reply, I call to your attention subsections (a), (b), and (c) of Section 269 of the General Revenue Act of 1935 as amended by Act No. 526, approved

September 14, 1935 (General Acts, 1935, page 1113), and as further amended by Act No. 55, approved March 26, 1936 (General and Local Acts, 1936, Extra Session, page 30), which read as follows:

"(a) In order to obtain the redemption of land from tax sales where the same have been heretofore or hereafter sold to the State, the party desiring to make such redemption shall deposit with the Judge of Probate of the County in which the land is situated, the amount of money for which the lands were sold, with interest thereon at the legal rate of interest prevailing at the time said property was sold for taxes, together with the amount of all taxes found to be due on such land since the date of sale, as provided herein, with interest thereon at the legal rate of interest prevailing from the maturity of such taxes, and all costs and fees due to officers.

"(b) Upon application to the Probate Judge to redeem land, where the same has been sold to the State for taxes, which application shall be made on blank forms furnished by the State Land Commissioner, the probate judge shall submit such application to the Tax Assessor of the County in which the land sought to be redeemed is located, and the assessor shall, without delay, enter on such application an assessment value for each of the years for which taxes are due, subsequent to the year for which such land was sold to the State for taxes, and such assessment value shall be sixty percent of the fair and reasonable market value of such lands as of October 1st of the year or years subsequent to the year for which the land was sold for taxes.

"(c) Any party having a right to redeem said property, his agents or attorney, shall have the right to file a written protest with the Court of County Commissioners or like governing body of the County, and to the State Tax Agent objecting to the valuation of said land as placed on said property by the Tax Assessor as provided for under sub-section (b) of this section, setting forth his ground of objection to the assessed value of said property as fixed by said Tax Assessor, and the Court of County Commissioners or like governing body shall, thereafter, fix a day for hearing said protest by giving to the Tax Assessor and party desiring to redeem, his agents or attorney, at least ten days written notice of the day and place of hearing said petition, and upon the hearing of said cause, the Court of County Commissioners, or like governing body shall have the right to review the assessed value of said property as fixed by the Tax Assessor, and shall fix and determine the assessed value for each year of the years for which taxes are due subsequent to the year for which such land was sold to the State for taxes, as provided for under subsection (b) of this act, and the Court of County Commissioners or like governing body shall certify to the probate judge the assessed value of said land so fixed."

Applying the above provisions of law to the facts stated in your letter, it will be noted that it will be necessary for the Probate Judge upon being presented with an application for the redemption of this particular land to submit the said application to the Tax Assessor who must in turn "enter on such application an assessed value for each of the years for which taxes are due subsequent to the year for which said land was sold." The taxes for 1939 were due October 1, 1939, and therefore the Tax Assessor must enter on the application for redemption an assessment value for said year and the property owner must pay to the Judge of Probate in order to redeem said land

the amount of money for which the land was sold for taxes, with interest at the legal rate at the time said property was sold, together wih the taxes found to be due for the year 1939.

It is true the owner assessed the land for 1939 taxes prior to the sale of said land for non-payment of 1938 taxes, but as heretofore pointed out, the 1939 taxes are now due and therefore in redeeming, the procedure heretofore pointed out must be followed. If the owner had made application prior to October 1, 1939, to redeem the said lands he would have been required to pay only the amount of money necessary to redeem from the 1938 tax sale as the 1939 taxes would not have been due and then he could have re-assessed the land for 1939 taxes and paid the same in the office of the tax collector.

Compare opinion of this office to Hon. Homer F. Mitchell, Judge of Probate, Cullman County, Cullman, Alabama, dated March 18, 1936 (Quarterly Report of Attorney General, Vol. II, page 322).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 28, 1939.

Hon. C. E. Sauls, Director,
Department of State Docks and Terminals,
Mobile, Alabama.

Department of State Docks and Terminals authorized to pay operating expenses of cold storage plant used as an integral part of the State's terminal facilities.

Opinion by the Attorney General.

Dear Sir:

This is to acknowledge receipt of your letter of December 26, 1939, and enclosed copy of a proposed agreement to be entered into by the State Department of Docks and Terminals and the City of Mobile.

You inquire as to whether or not you can legally pay the operating expenses of a cold storage plant operated as an integral part of the Department of State Docks and Terminals, in accordance with the terms of the said agreement.

I have carefully examined the agreement and it is my opinion that you, as Director of the State Docks and Terminals, can legally pay out of the funds of the Department of State Docks and Terminals, the operating expenses of the cold storage plant operated by the Department, thereby conserving the

receipts and income by the cold storage plant, to be used for the purpose of paying the interest and principal on the bonds issued for the purpose of constructing said cold storage plant.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 29, 1939.

Hon. E. W. Vance,
Member, Board of Revenue,
Barbour County,
Eufaula, Alabama.

Local Act No. 342, S. 357, approved September 6, 1939, construed:

Under authority of said Act, claims of late Sheriff Laseter, when presented, considered and audited and payment ordered, are on equal footing with all other claims for officers' fees against fine and forfeiture fund and paid as required by Act No. 539, H. 818, approved September 28, 1923 (Local Acts 1923, page 322).

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your letter of November 23, 1939, in which you request my opinion as follows:

"On October 25, 1939, you rendered an opinion to the Board of Revenue of Barbour County—on Act No. 342, 357, approved September 6th, 1939, that it was a **valid enactment.** This enactment permitted the Board of Revenue of Barbour County to pay Mrs. J. B. Laseter certain claims out of the Fine and Forfeiture Fund of Barbour County due her husband J. B. Laseter, as sheriff, accruing in his favor in **1919, 1920, 1921.**

"One more question we desire your advice upon. The present sheriff and clerk have 'up to date certificates' due them from the Fine and Forfeiture Fund—which their efforts as officers have placed in the Fine and Forfeiture Fund—and there is not sufficient funds to the credit of the 'Fine and Forfeiture Fund', to pay the Laseter claim, and the present sheriff and clerk at this time. All of them claim that they are entitled to the money now on hand. Our Board would thank you for an opinion as to how we should meet this condition. The **'priority'** of the respective claims are at issue. The clerk and the sheriff claim that it was their efforts that put the money that is now on hand into the Fine and Forfeiture Fund—**to the credit** of claims against it, and then the **Laseter claim,** made legal by the Laseter Bill of the recent Legislature,

should wait until the Clerk and Sheriff received an amount equal to the sum of their present certificates. The Laseter people insist that under the recent law, they are entitled to payment also now, or **at least such funds that are now on hand,** should be paid out on a 'pro rata basis.'

"Our Board is at a loss to determine the proper method. We will thank you to advise us—just the proper method of dividing out the cash in this fine and forfeiture fund—so as to equalize it fairly to the several claims."

In my opinion, the effect of Local Act No. 342, S. 357, approved September 6, 1939, is to allow Lucinda Laseter, Widow of the late Sheriff Laseter, to present to the Board of Revenue of Barbour County, Alabama, certain claims which accrued in favor of the said Sheriff Laseter while sheriff of said county, and to authorize the said Board to consider, audit and direct payment of the claims in the manner prescribed by law, out of any funds in the fine and forfeiture fund available for the payment of officers' fees.

As shown by said act, supra, the claims of the late Sheriff Laseter accrued in the years 1919, 1920 and 1921 and were duly filed and registered as required by the then existing law. However, I call attention to Act No. 539, H. B. 818, approved September 28, 1923, (Local Acts 1923, p. 322) which required that all claims against the fine and forfeiture fund of Barbour County, including officers' claims were, by said act, required to be presented to the Clerk of the Board of Revenue for registration in a book to be kept by the Clerk, not later than the first day of January after the passage of the said act; and further provided that claims not so filed should not be paid. In my opinion, this act had the effect of requiring all claims against the county fine and forfeiture fund, including claims theretofore filed and registered, to be refiled as therein provided, and a failure to refile a claim caused it to be barred. It will therefore be seen that the claims of Sheriff Laseter were barred by the 1923 Act, supra, as they were not refiled, and the only effect of the 1939 Act, supra, was to give the widow of the said sheriff the right to refile the claims and to authorize the Board of Revenue to pay them. This is a valid exercise of legislative authority. See Opinion of this office addressed to Hon. B. P. Singleton, dated November 9, 1939, a copy of which is herewith enclosed.

The 1939 Act, supra, gives the claims of Sheriff Laseter no priority over like claims and therefore they must be paid in the mode and manner prescribed by law for payment of officers' fees out of the Fine and Forfeiture Fund of Barbour County.

The manner of paying officers' fees out of the Fine and Forfeiture Fund of Barbour County is found in the 1923 Act. supra, which reads in pertinent part as follows:

"Section 1: That it shall be the duty of the Clerk of the Board of Revenue of Barbour County, Alabama, to provide a book for the registration of claims against the fine and forfeiture fund of said County, and all claims against the fine and forfeiture fund of said County shall be presented for registration, in said book, to the Clerk of the Board of Revenue of said County by the holder thereof, and all persons, including County officers, who hold fine and forfeiture claims against said County shall, not later than the first day of January after the passage of this Act and the first day of January each year thereafter, file said claims with the Clerk of the Board of Revenue for payment, and the claims so filed

and presented for payment against said fund shall be audited and allowed, or rejected, by the Board of Revenue of said County, not later than the first day of February following, and the amount to the credit of said fine and forfeiture fund, if insufficient to pay said claims in full, shall be prorated and distributed prorata among the holders of such claims against said fund. *** "

It is therefore my opinion that the claim of the late Sheriff Laseter against the Fine and Forfeiture Fund of Barbour County when allowed is on an equal footing with all other claims for officers' fees against said fund, and the same must be paid as required by the 1923 Act, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

December 29, 1939.

Hon. B. P. Singleon,
Chief Examiner of Public Accounts,
Department of Finance,

Filing Tax—Conditional Sales Contract—Under facts stated, probate judge is put on notice and should inquire as to the details of the transaction before allowing the instrument to be recorded.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for an official opinion dated December 1, 1939 which follows:

"Please refer to a ruling from your office to me, as State Comptroller, under date of February 2, 1939, by Assistant Attorney General Edward B. Crosland, and in further connection with this matter I wish to have you re-rule on the liability of a Probate Judge regarding filing taxes for the recording of chattel mortgages and instruments of a similar nature. In connection with this matter I would like to cite the following:

" 'The firm of Blank Motor Company located in Lafayette, Alabama, in filing for record automobile sales contracts, only paid deed tax where there was a cash down payment. If a used car was traded in for the down payment no deed filing tax was charged, as shown by the records of the Probate Judge's office. On the face of the instrument filed for record where a car was traded in for the down payment there was written—"I hereby certify that no down payment was made."

"'The Probate Judge takes the position that he is not responsible for the loss of funds due the State and County on instruments filed for record of the above nature, neither is the law specific as to how far the Probate Judge shall go in ascertaining the status of the transaction.

"'A representative of the Blank Motor Company readily agreed to pay the amount found to be due the State and County as shown in the report due to the above filing performance, and they were informed that the Department at this time was not insisting on the payment, pending further instructions.'"

This office here heretofore ruled that the privilege tax to be paid on a chattel mortgage is based on the principal sum secured. **Quarterly Report of Attorney General,** Vol. III, p. 216.

When a retention of title contract or conditional sales contract is offered for record, a mortgage tax should be paid on the balance due as indicated in the instrument and a deed tax should be paid on the difference between the amount in the instrument and the value of the property conveyed.

Biennial Report, Attorney General, 1936-38, p. 325;

Quarterly Report, Attorney General, Vol. XI, p. 70;

Quarterly Report, Attorney General, Vol. X, p. 188;

Quarterly Report, Attorney General, Vol. IX, p. 171;

Quarterly Report, Attorney General, Vol. V, p. 23.

The deed tax should be paid on the down payment under the conditional sales contract and it is immaterial if the payment is in cash or in a second hand car.

The rule to be followed is laid down by the Court of Appeals in the case of **Thompson v. Smith,** 27 Ala. App. 460, 174 So. 796, Cert. Den. 234 Ala. 904, 174 So. 797 as follows:

"We think there can be no doubt that "the determination of the amount of tax to be paid on an instrument (offered for recordation) is left to the Probate Judge.' **Long, Judge, v. Jasper Land Co.,** 217 Ala. 593, 117 So. 210.

"True, he 'may accept as prima facie correct the recitals of the deed (or bill of sale, we interpolate)—and may act accordingly, **in the absence of any fact or circumstance to the contrary, coming to his attention calculated to put on notice a reasonably prudent person.'** (Emphasis supplied). **Long, Judge, v. Jasper Land Co., supra."**

In Words and Phrases, Second Series, Vol. 4, page 194, it is said:

"A 'reasonably prudent man' will neither neglect what he can foresee as probable, nor waste his anxiety on events that are barely possible, but

will order his precaution by the measure of what appears likely in the known course of things."

In my opinion, a probate judge is presumed to know the common business practices in the community and everyone knows that as a general business practice automobiles are not sold without the seller receiving some consideration or down payment on the car, which payment is often made by the purchaser trading in his used automobile.

It is, therefore, my opinion that when the contract referred to in your letter was offered for record, although it had written on its face, "I hereby certify that no down payment was made," this was sufficient to put the probate judge on notice, and he should have inquired as to the details of the transaction before allowing the instrument to be recorded.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 29, 1939.

Hon. P. W. Lett,
Supt. of Education,
Dale County,
Ozark, Alabama.

Schools—County Boards of Education—Assumption of debt for school purposes.

County Board of Education not authorized to assume payment of indebtedness previously incurred by citizens or school patrons in order to complete construction of a school building, said board itself not having originally incurred any such obligation.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion dated November 11, 1939 which reads as follows:

"On October 1, 1924 the Dale County Board of Education sold $10,000.00 worth of bonds to be paid from the proceeds of the three mill county tax levied for public school purpcses in order to erect a school building in the town of Pinckard.

"According to Minutes of the Dale County Board of Education, it was agreed that citizens of the Pinckard school district would realize by public

subscriptions and contributions the additional amount needed to complete the said school building. These citizens borrowed about $3,000.00 for this purpose. There remains $2,700.00 of this money unpaid, and now the Pinckard citizens are asking the Dale County Board of Education to assume this obligation, to be paid from the General Funds over a period of two or three years, if necessary.

"Please advise me if the Dale County Board of Education can legally assume responsibility for paying this obligation of $2,700.00."

I am of the opinion that the Dale County Board of Education, under the statement of facts above made, cannot legally assume payment of the aforementioned obligation. Apparently the citizens in 1924 voluntarily contributed or agreed to contribute the money needed to complete the school building and the County Board of Education was under no obligation in respect thereto. Any assumption of said debt at this time would be without consideration, and unenforceable. Nor do I find any provision of law or statute whereby such an assumption could be sustained.

This office has ruled that a county board of education cannot assume payment of bonds issued by a city to provide funds for construction of a high school building under the provisions of Act No. 757, S. 384, approved August 7, 1907 (General Acts 1907, page 728—Code 1907, Sections 1861-8), and amendments thereof. See opinion of Attorney General, March 25, 1939, to Hon. O. C. Bottoms, Superintendent of Education, Etowah County (Quarterly Report, Attorney General, Vol. XIV, page 230).

In an opinion of the Attorney General rendered April 15, 1939, to Hon. Roy D. McCord, Member of the Legislature, Gadsden, Alabama (Quarterly Report of the Attorney General, Vol. XV, page 20), it was held that the Legislature could pass a local act empowering the county board, however, to assume the aforementioned municipal bonds on the theory of moral obligation, and that such an act would not be obnoxious to Section 94 of the Constitution.

From your statement it appears that the citizens of the Pinckard School District did **not advance** money to complete the school building, but raised it "by public subscriptions and **contributions,**" that is to say, by donations. There being no obligation originally on the part of the board in respect of money so contributed or donated, there is no authority, as pointed out in the opinion of March 25, 1939, for the board to refund advances as contemplated by Section 137 of the School Code of 1927. **Biennial Report of Attorney General,** 1934-36, p. 156.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 29, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

License Taxes—Gasoline Pumps—

Section 67 of the Revenue Act of 1935 held to be applicable to filling stations or gasoline pumps operated for profit within three miles of the corporate limits of a city.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of November 27, 1939, in which you request my opinion as follows:

"Please refer to Schedule No. 67, 1935 Revenue Acts and advise me whether or not the city limits is the basis by which license under this schedule are issued or whether the center of the town governs their issuance. The general public construes this schedule to mean from the center of town and as a rule do not know anything about where the city limits are. It occurs to us that it would be rather an injustice to make this apply from the city limit."

In reply, I wish to advise you that Schedule 67 of the 1935 Revenue Act (Simon's Revenue Code, page 242) provides in part as follows:

"SCHEDULE 67. Each person operating for profit a GASOLINE FILLING STATION or pump in cities or towns, or within three miles thereof, shall pay the following privilege tax: * * *"

I wish to particularly call your attention to the provisions of the above statute which specify that a license fee shall be placed upon a filling station "in cities or towns or within three miles thereof". In my judgment, the words "within three miles thereof" mean within three miles of the corporate limits of the city. A parallel situation appears in the case of **State v. H. G. Fain Service Station,** 23 Ala. App. 239, 124 So. 119. In this case the section of the Revenue Laws of 1927 (Act No. 163, H. B. 359, General Acts of 1927, page 161) levying a license upon the operation of a gasoline filling station or gasoline pump for profit is construed, and provides as follows:

"'Each person, firm or corporation operating for profit a gasoline filling station or pump in cities or towns, or within five miles thereof, shall pay the following privilege tax: In cities of one hundred thousand inhabitants and over, where only one pump or filler is used, Fifty Dollars ($50.00), and for each additional pump Fifty Dollars ($50.00); in cities of Forty Thousand inhabitants and less than One Hundred Thousand, where only one pump or filler is used, Forty Dollars ($40.00), and for each additional pump Forty Dollars ($40.00); in cities of Twelve Thousand inhabitants and less than Forty Thousand, Thirty Dollars ($30.00) where

only one pump filler is used and for each additional pump or filler, Thirty Dollars ($30.00); in cities or towns of Five Thousand inhabitants and less than Twelve Thousand, Twenty-five Dollars ($25.00) where only one pump or filler is used, and for each additional pump, Twenty-five Dollars ($25.00); in incorporated towns of One Thousand inhabitants and less than Five Thousand, where only one pump or filler is used, Twenty Dollars ($20.00) and for each additional pump, or filler, Twenty Dollars ($20.00); in incorporated towns of less than One Thousand inhabitants Ten Dollars ($10.00) and for each additional pump or filler Ten Dollars ($10.00); and in all other places Five Dollars ($5.00) for each pump or filler.'"

In this case the Court of Appeals held that a gasoline station operated for profit and within five miles of the corporate limits of a city was within the act; however, that when the gasoline pump or filling station within five miles of the corporate limits of one city lay within the corporate limits of another city, that the license tax imposed must be at the rate imposed by the smaller of the two cities. It is significant here that the courts have construed the license imposed by this section to be upon a filling station or gasoline pump within a specified distance **of the corporate limits of the city.** It is, therefore, my judgment, and I so advise you, that the corporate limits of the city must constitute the point from which the distance is measured for the determination of the imposition of the license here considered, and not the center of the city.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 29, 1939.

Hon. Wm. A. Conrad,
Clerk, Circuit Court,
Mobile County,
Mobile, Alabama.

Witness Fees—

1. Witnesses must claim certificate of attendance within five days after adjournment of the session of court which they attended.

2. Witnesses allowed fees in only one case in one day.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of November 24, 1939, in which you request my opinion as follows:

"I respectfully request your opinion on the following questions:

"1. How many days has a State witness attending in only one criminal case in the Circuit Court allowed from date of attendance within which to claim his certificate for attendance?

"2. How many days has a State witness attending in more criminal cases than one on the same day in the Circuit Court allowed from date of attendance within which to claim certificate for attendance?"

In answer to your question number one, I refer you to Section 7235 of the Code of Alabama, 1923, which reads as follows:

"7235. Attendance, when proven.—The witness must prove his attendance within five days **after the adjournment of the session of the court** at which he attended." (Emphasis supplied)

This section has been held to apply to both criminal and civil cases. See opinion of this office to Hon. M. H. Johnson, under date of January 4, 1932, page 613, Biennial Report of the Attorney General, 1930-32; and also opinion to Hon. L. E. Hall, under date of October 28, 1937, page 50, Vol. IX, Quarterly Report of the Attorney General.

In answering your second inquiry, let me call your attention to Section 3770 of the Code of 1923, as amended by Act No. 34, H. 96, approved February 17, 1939, General Acts 1939, Pamphlet page 35, which reads as follows:

"3770. Fees of state witnesses when subpoenaed in more cases than one.—A witness for the state, attending in more criminal cases than one one the same day, shall only be entitled to fees in one case, to be selected by him while so attending."

From the above section it is seen that the witness must select the case in which he is to receive payment for attendance. However, if the case he selects terminates and he is required to attend another day or days for the other case, then he is to be paid for same. This section allows only one per diem for two cases on one day. In effect, therefore, a witness summoned to testify in two criminal cases on one day is entitled to the same fees as a witness in one case. See opinion to Hon. W. J. Kern under date of May 30, 1939, page 244, Vol. XV, Quarterly Report of Attorney General. The same regulations apply to each.

Therefore, it is my opinion that Section 7235, supra, applies to a witness called for two criminal cases on the same day.

I answer your questions specifically as follows:

1. A witness attending one criminal case in the circuit court must claim his certificate of attendance within five days after the adjournment of that session of the court.

2. A witness attending two criminal cases in the circuit court on the same day must claim his certificate of attendance within five days after the adjournment of that session of the court.

It must be kept in mind that a "Session" of Court is that period fixed by order of the Court for the actual trial of cases. Section 6675 of the Code of Alabama, 1923 defines "Sessions" as follows:

"The word "session" or "sessions" of courts, when used in this Code means parts of terms of courts, and includes all calls or sittings of the courts during any term."

See also **Carpenter v. City of Birmingham,** 221 Ala. 368, 128 So. 899.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 29, 1939.

Hon. John C. Curry, Commissioner,
Department of Revenue,
Capitol.

Foreign Surety Companies: (Code, 1923, S. 2642)

The deposit of $50,000 in securities by foreign surety companies required to be made with the State Treasurer, is a part of the actual amount of capital employed in this State, and should be included in fixing the annual franchise tax (Acts 1935, p. 387, Section 318) and annual permit fee (Acts 1935, p. 385, Section 315) payable by foreign corporations.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion dated October 17, 1939, which reads as follows:

"A number of foreign insurance and guaranty companies have qualified in this State to engage in the business of making surety and indemnity bonds. As a prerequisite to being granted the authority to execute such bonds, these companies have deposited with the Treasurer of the State of Alabama securities to the value of $50,000.00, as required by section 2642 of the Code of Alabama 1923.

"Section 232 of the Constitution of Alabama (1901) provides that the legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by foreign corporations qualifying to do business in this State, based on the 'actual amount of capital employed in this State.' This tax, so authorized, was imposed by the General Revenue Act of 1935, Article 9, Chapter 3, Section 318 (General Acts of Alabama 1935, p. 387), which section provides in part as follows:

" 'Every corporation organized under the laws of any other state, nation or territory, and doing business in this State, except strictly benevolent, educational or religious organizations, shall pay annually to the State of Alabama an annual franchise tax of Two Dollars on each One Thousand Dollars of the actual amount of capital employed in this State.'

"The Revenue Act of 1935, Article 9, Chapter 2, Section 315, provides that:

"'Any foreign or non-resident corporation and all corporations organized under or by authority of the laws of any state or government other than the State of Alabama * * * shall be required to procure from the State Tax Commission when it is admitted or authorized by law to do business, and annually thereafter, a permit * * *.'

"The amount required to obtain such permit is based on the amount of 'capital employed in this State.'

"These companies claim that the securities to the value of $50,000.00, deposited by them as a prerequisite to doing such business in this State, are not capital employed in this State within the meaning of such term employed in the above mentioned statutes and constitutional provisions, and therefore should be excluded in determining the amount of the franchise tax and permit fee required to be paid annually by such foreign corporations.

"Please advise whether or not such deposits constitute capital employed in this State and, as such, should be included in determining the amount due for corporate franchise tax and corporate permit fee."

It has been suggested that the statute now considered and imposing the franchise tax on foreign corporations has been construed, insofar as inclusion of the deposit required to be made by surety companies is concerned, by executive departmental failure in the past to include such deposit as part of capital employed in Alabama in fixing the franchise tax on such corporations.

Such construction can not be resorted to, however, and is not controlling, where the statute, as in this instance, is clear and explicit in its language, and its meaning is not doubtful. 25 R. C. L. 1043, Section 274.

10 Ann. Cas. 51;

U. S. vs. Graham, 110 U. S. 219;

Robinson vs. Ludrigan, 227 U. S. 173.

In my judgment, the cases which are hereinbelow set out clearly demonstrate that the statute in question is so clear and explicit as to bring it within the rule above announced, so that even if it may be assumed that there has been a long continued departmental construction of the statute indicating an intent not to include such a deposit as part of the capital employed in the State of Alabama in fixing the franchise tax on such corporations, such construction may not now be resorted to in defense of any accepted collection.

You are, therefore, advised that the deposits required to be made with the State Treasurer by foreign surety corporations doing business in Alabama (Code, 1923, Section 2642) constitute capital employed in this State, and, as such, should be included in determining the amount due for corporate franchise tax and corporate permit fee, for the following reasons:

The issue raised is, Whether the deposit required to be made with the State Treasurer of $50,000 of securities by foreign surety corporations under Section 2642 of the Code of 1923, **"in trust for the benefit of the resident holders**

of the obligations of such corporations" is a part of their "capital employed in this State," within the meaning of Section 232 of the Constitution of 1901 and the General Revenue Act of 1935, imposing an annual franchise tax on foreign corporations, (Act No. 194, H. B. 324, approved July 10, 1935, Acts 1935, pages 256, 387, Section 318) and within the meaning also of Section 315 of the Act requiring payment by such corporations of an annual permit fee.

The meaning of the words "capital employed in this State" has been considered from time to time by our Supreme Court in decisions relating to the franchise tax on foreign corporations.

State v. Burchfield Bros., 211 Ala. 30, 99 So. 198 (1924);

Ellis v. Handley Mfg. Co., 214 Ala. 539, 108 So. 343 (1936);

Penn Mutual Life Ins. Co. v. State, 223 Ala. 332, 135 So. 346 (1931);

State v. Nat'l Cash Credit Ass'n., 224 Ala. 629, 144 So. 541 (1932);

State v. Anglo-Chilean Nitrate Sales Corp., 225 Ala. 141, 142 So. 87 (1932);

Investors' Syndicate v. State, 227 Ala. 216, 149 So. 83 (1933)

Wisconsin Coosa Co. v. State, 231 Ala. 543, 165 So. 838 (1936)

State v. Southern Natural Gas Corp., 233 Ala. 81, 170 So. 178 (1936)

State v. Pullman Standard etc. Co., 235 Ala. 493, 179 So. 541

Consolidated Coal Co. v. State, 236 Ala. 489, 183 So. 650 (1938)

In the **Consolidated Coal Co.** case, supra, the company resisted payment of the tax on the ground that it was not engaged in doing business in Alabama although it owned a large tract of coal lands in the State leased to another company which paid a franchise tax.

Said the Court:

> "With much detail the statement of facts shows a careful avoidance of any corporate business or activity in Alabama by the parent company; and that the lessee, a distinct corporate entity qualified to do business in Alabama, and paying a franchise tax to the State conducts all corporate business in Alabama even to the keeping of books for the lessor, by one of the lessee's employees, showing the state of accounts between lessor and lessee," etc.
>
> "A controlling fact in this case," says the court, "is that the corporate properties were employed in the corporate enterprise, the mining and marketing of coal, the corporate business for which both corporations exist."

The tax, said the court, is "measured by the actual amount of capital employed in Alabama in the exercise of such corporate functions, **capital employed in a business for which the corporation was created and has its existence as a corporate entity."** (Emphasis supplied).

The deduction from that case is, necessarily, that by the mere holding of property in Alabama from which a foreign corporation receives an income

by leasing it to a subsidiary, such lessor corporation is employing that part of its capital in Alabama represented by the leased property, and is subject to a franchise tax based on the value of the leased property.

So in the Investors' Syndicate case (227 Ala. 216) property acquired by the foreign corporation by foreclosure of its mortgages securing loans previously exempt by payment of the mortgage record tax, was held to be a part of capital employed within the State from and after date of foreclosure.

From the earliest time (Bank of Augusta v. Earle, 13 Pet. 519), the doctrine has prevailed that the States "may exclude the foreign corporation entirely * * * or may exact such security for the performance of its contracts with their citizens as, in their judgment, will best promote the public interest."

Paul v. Virginia, 9 Wall. 168, 19 L. ed. 357;

State v. Anglo-Chilean etc. Co., 225 Ala. 141, 142 So. 87 (1932).

The deposit exacted by the statute of foreign surety companies doing business in Alabama is based on this doctrine, is required as security for the performance of their contracts in Alabama, and, to quote the statute, is held "in trust for the benefit of the resident holders of the obligations of such corporations." It is an essential feature of their business in Alabama. This deposit represents such part of their capital as they must place in Alabama to insure the performance of their contracts, and corresponds to the capital of domestic surety companies, which would be likewise subject in its entirety to a franchise tax at the same rate. (Constitution, Section 329; Act No. 194, H. B. 324, approved July 10, 1935, Acts 1935, page 387, Section 317).

The words **capital** and **capital employed** have a well defined and definite meaning, as may be gathered from numerous cases cited in Words & Phrases.

"The capital of a corporation consists of its funds, securities, credits and property of whatever kind, which it possesses."

Christensen v. Eno., 106 N. Y. 97, 12 N. E. 648.

"The word capital, as applied to money of a corporation, may refer to the money paid in by the stockholders for the use of the corporation, *** but in a higher and more popular sense it includes all the money and other property of the corporation used in transacting its business. So long as the profits are not withdrawn from the business, they contribute a part of the capital."

Iowa State Sav. Bank v. City Council, 98 Iowa 737, 61 N. W. 851.

"In its broadest meaning, the word 'capital' signified actual assets, whether in money or property, owned by an individual or a corporation. It is the fund upon which a corporation transacts business, which is liable to its creditors, and in case of insolvency passes to a receiver. The capital of a bank is not composed of immovable property."

State v. Board of Assessors, 48 La. Ann. 35, 18 So. 753.

"The term 'capital' as used in the provisions of the tax Acts which relate to the return for taxation of property *** means the same as all the property of the corporation."

Ga. R. & Banking Co. v. Wright, 125 Ga. 589, 54 S. E. 52, 56.

"Book value of realty purchased by foreign corporation at mortgage foreclosure made by corporation for collection of its loans in real estate held 'capital employed within State,' subject to franchise tax."

Investors Syndicate v. State, 227 Ala. 216.

Mr. Cooley in his work on taxation (Cooley on Taxation, Vol. II, 4th Edition, page 1895, Section 943) states the rule in this regard to be that:

"Deposits of bonds or the like made by foreign corporations such as insurance companies, with a state officer, as required by statute, are generally held taxable where located, **and are also taxable as capital employed within the State.** * * * So it has been held that bonds deposited with the superintendent of insurance under a law requiring foreign insurance companies to deposit the same with him as a condition of their doing business in the state are taxable as an investment employed in carrying on business in the state, under a constitutional provision that 'laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, and also all real and personal property according to its true value in money,' and a statute enacted to carry out the same provising that 'all property whether real or personal in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks, or otherwise of persons residing in this state, shall be subject to taxation.'"

A Federal District Court in the State of Ohio in the case of **Western Assurance Company of Toronto v. Halliday, 127 F. 830,** Cert. Den. 193 U. S. 673, reached a similar conclusion in holding taxable under the laws of Ohio municipal bonds owned by foreign companies doing business in Ohio and held on deposit with the Superintendent of Insurance in Ohio for the benefit and security of the policyholders residing in that State, the Court stating:

"The insurance company, through its agents and representatives, is carrying on business in this state, and this deposit, in part at least, furnishes the capital and basis of credit for that business. **It is capital employed in carrying on business in this state in the same sense that the capital of the domestic fire insurance company is employed in carrying on business when it is invested in bonds, etc., as required by section 3634.**

* * * *

"These bonds therefore being within the state as an investment of that part of the capital of the insurance company employed in carrying on business here, are made subject to taxation by the Constitution of the state, which provides that 'laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money;' and by section 2731 of the Revised Statutes of 1890 of the state, which provides that 'all property whether real or personal in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks, or otherwise of persons residing in this state, shall be subject to taxation.'"

The Supreme Court of the United States had almost the identical question here raised presented to it in the case of **Scottish Union and National Insurance Company v. Bowland,** 196 U. S. 611, the court holding that the laws of

the State of Ohio, as construed by the Supreme Court of that State had conferred the right to tax bonds deposited by a foreign insurance company with the Insurance Commission under the laws regulating the right to do business in that state, and concluding that a tax on such bonds was a valid imposition.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 29, 1939.

Honorable P. B. Hamilton, Chairman
The Personnel Board of Mobile County
Old Customhouse
Mobile, Alabama

Mobile County Merit System Act held to repeal all provisions of former acts in conflict therewith, whether general, special or local (Act No. 470, H. B. 952, approved September 15, 1939)

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of December 19, 1939, in which you request my opinion as follows:

"Does the Mobile County Merit System Civil Service Act, approved September 15th, 1935, repeal all provisions of former Mobile County local acts as to the number, method of selection or appointment, terms of office or employment, hours of work, and rate of compensation, of classified employees?"

In my opinion, the Mobile County Merit System Act (Act No. 470, H. B. 952), approved September 15, 1939—Local Acts 1939, page 298, evinces a clear intent to repeal all provisions of former Mobile County local acts in conflict therewith.

Section 36, the repealing clause of the Mobile County Merit System Act, provides as follows:

"Section XXXVI. REPEALING CLAUSE: All laws or parts of laws inconsistent or in conflict with this Act are hereby expressly repealed. Specifically and again without limiting the generality of the above, all laws or parts of laws, the effect of which is to prescribe a different method of selection or appointment or to fix terms of office or employment and hours of work and the rate of compensation for services contrary to the express or implied effect and provisions hereof are repealed, it being the legislative intent that the terms of this Act shall be fully effective, and laws or parts of laws heretofore enacted, to the contrary notwithstanding."

This section is identical in legal effect with the section of the Merit System Act of the State of Alabama of March 2, 1939, concerning which the Supreme Court of Alabama, speaking through Mr. Justice Knight in the case of **Heck v. Hall,** 190 So. 280, 287, stated:

"'A repealing clause will be given effect according to its express terms, even to the repeal of a special or local law.' Tucker v. McLendon, 210 Ala. 562, 98 So. 797; Maxwell v. State, 89 Ala. 150, 7 So. 824; State ex rel. Bibb v. Town of Warrior, 181 Ala. 642, 62 So. 69; Fidelity & Deposit Co. of Maryland v. Farmers' Hardware Co. et al., 223 Ala. 477, 136 So. 824; Allgood v. Sloss-Sheffield Steel & Iron Co., 196 Ala. 500, 71 So. 724."

It therefore appears that all laws or parts of laws in conflict with the provisions of the Mobile County Merit System Act enacted prior to the effective date of said act, to-wit, September 15, 1939, whether general, special or local, were specifically repealed by the express provisions of said act.

Any determination of whether a particular local, special, or general act affecting Mobile County conflicts with the Merit System Act will, of course, require a comparison of said acts.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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